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SOME REMINISCENCES OF RUFUS CHOATE.

MANY anecdotes have been published of Mr. Choate, and many of his quaint sayings have long been current in the profession. The writer of this article was for two years a student in his office, had a good opportunity of becoming acquainted with him, and remembers some instances of his wit and humor and peculiarities that have not hitherto been published. It is thought they may be worthy of preservation, as relating to so distinguished an ornament of the American bar; and they may be relied on as having happened under the writer's own observation, or as received from the best authority.

Mr. Choate was generally very regular in his attendance at the office; coming to it at nine o'clock, or earlier, and spending the mornings there. Upon entering his room (an inner one), he closed the door, and all his consultations with clients were private, — very different from the custom which is said to prevail in Sicily, where the lawyer and all his clients sit together in one room, and each of the latter states his case in presence of those assembled, and receives the advice, not only of the lawyer, but of all his neighbors. The students, who sat in an outer room, did not go into Mr. Choate's room unless he was alone; and then he was almost always found standing at a high desk, or leaning slightly against a tall counting-house chair, pen in hand, and diligently studying and writing. I never knew him to be annoyed by interruption. I never heard him say he was busy, or even ask to be excused from answering a question *then*. He would at

once give the desired information, or refer to some law-book in which the subject was discussed, or, whatever the topic, easily enter upon it, as if it had just been the subject of his meditations. Such was his great alertness of mind.

His students were, of course, very chary of visiting his room, except when he was alone. Not so a fellow-lawyer in the same entry, who one day (he was in the habit of doing it) burst into Mr. Choate's room, and, without any apology, broke in upon a conversation which Choate was holding with several gentlemen in a very important case, and shouted, "Choate, I have caught one of your famous Greek authors in a most egregious blunder! He says" — repeating the Greek words — "that the half is *more* than the whole. Now, that is impossible." — "Suppose," remarked Choate, evidently amused at the state of excitement the man was in, "you translate the word by *better* instead of *more*. The half is better than the whole, — just as half a speech may be better, more to the purpose, than the whole." — "That won't do," persisted the man with great pertinacity. "The word means *more*, and every one knows the statement is a mathematical absurdity." And he left the room, rejoicing in his exposure (!) of the stupidity of the old Greek.

A leading member of the bar and Mr. Choate took the deposition of a witness produced by the latter. After the business was finished, the counsel came into the office. "Well, brother Choate," said Mr. P., "I don't think you have made any thing out of that witness: there are too many *hiati* in his testimony." — "Impossible!" said Choate. "But there were: you must have noticed them yourself." — "I couldn't," rejoined Choate. "You couldn't! Why not?" — "Because *hiatus* is of the *fourth* declension." And then Choate gave his peculiar, silent laugh, drawing in his breath deeply, while his whole face glowed with fun.

A young lawyer was employed to defend a man who was indicted for stealing a watch from a fellow-boarder. It was desired to retain Mr. Choate for the defence, as senior counsel. The young man<sup>1</sup> called upon him for this purpose; and well

<sup>1</sup> This gentleman, the late Allen C. Spooner, once moved the court to postpone a case in which he was engaged. The judge refused the application, saying, "I suppose you are aware, Mr. Spooner, that this court sits here for the despatch of business." — "I beg your Honor's pardon," replied Mr. Spooner: "I thought it sat here for the administration of justice." The request was granted.

known as the former was among his contemporaries for quickness, acuteness, and vigor of intellect, he told me he was surprised and mortified at the number of questions that Choate put to him which he could not answer. At the trial, the complainant testified that early in the morning, while he was in bed, the defendant entered his room, went to a table on which the watch was lying, took it up, looked towards the bed, where the witness was pretending to be asleep, and, holding the watch in his hand, very quietly left the room; that he saw all this plainly, and could not be mistaken; that he supposed it to be a joke, as he and the accused were old friends, and, when leaving the breakfast-table, said to him that he would take his watch, expecting it would be immediately given up to him; that the defendant, to his astonishment, denied having touched his watch and having been in his room that morning; that it was only after finding, upon repeated requests, he could not obtain his property in an amicable way, that he had very reluctantly resorted to the process of the law. This was certainly a very strong case against the defendant. If the statement were believed by the jury, there was no chance of acquittal.

Upon the cross-examination, Mr. Choate said, "You have known the defendant many years; have you not?"—"I have." "How many?"—"Perhaps twenty."—"As man and boy?" "Yes, sir."—"In all this time, did you ever hear a single syllable against his character for honesty?"—"No, sir."—"Has not every one spoken well of him as an honest, straightforward man?"—"Yes, sir."—"Have you not been very intimately acquainted with him?"—"I have, sir."—"Has he not been a bosom friend of yours? Have you not asked his opinion and advice respecting your own affairs?"—"I have, sometimes." "And you found him always true and reliable?"—"I think I did, always, sir."—"Have you ever put your watch under your pillow?"—"I have, sometimes."—"This is a terrible charge you bring against your best friend. If he is convicted, it sends him to the State's prison. I suppose, before making such a charge against a dear old friend that may ruin him for ever, you made yourself absolutely certain, beyond all chance of mistake, that the watch was really gone. Did you look under your pillow, where you say you sometimes put it, to see if it might not be there?"—"Yes, sir, I did; and it was not there."



The last answer was enough to throw doubt over the rest of the witness's testimony. It rendered it uncertain whether he had actually seen the accused take away his watch; because if he had, and had no doubt of it, why should he afterwards look for his watch under the pillow? This doubt, the prisoner's general good character, and Choate's eloquent appeal in his behalf, were sufficient to induce the jury to acquit. Immediately after the trial, the complainant said to me, "Confound it! why did I say I looked under my pillow? I know I saw the man take my watch. I *never* looked under my pillow; but Choate put the questions in such a way, that I could not help saying I did, when I didn't." He told the truth. The accused ran off, without, I will add, paying Choate a farthing for saving him from the State's prison; and, shortly after, the watch was sent to the right owner by a respectable woman, to whom the culprit had given it as an engagement-present, and who, from the trial, discovered the crime of her lover, and also the right owner of the watch.

I may as well state in this connection as in any other, that I remember Choate's saying, "Never browbeat a witness on the cross-examination: it only makes him more obstinate and hostile. When I began to practise law, I used to think it very fine to be severe, and even savage, towards my opponent's witnesses; but I soon found it would not do, and I reformed my method altogether. Violence does no good: the gentle method is the best. It is the old story of the sun and the wind." His courtesy to witnesses was well known, and also the fact that he drew more from the most reluctant witness by the skill and suavity of his examination than others by harshness, or attempts to intimidate.

Mr. Choate related the following anecdote of his early life to a young member of the Suffolk bar who was regretting some mistake or oversight he had made: One stormy night, during his residence in Danvers, he was called upon at a late hour to draw up the will of a dying man who lived several miles distant. He went, performed the service, and returned home. But after going to bed, as he lay, revolving in his mind each provision of the paper he had so rapidly prepared, there flashed across his memory an omission that might cause the testator's intention to be misunderstood. He sprang from his bed, and began dressing himself rapidly, to the great surprise of his wife; only answering her inquiries by saying that he had done what must be undone,

and, in the thick of the storm, rode again to his dying client, explained the reason of his return, and drew a codicil to the will which made every thing sure. Mr. Choate then added, "A clever man will blunder sometimes; but a blockhead blunders — *ex vi termini*."

A blacksmith having failed in business, a friend, to enable him to start once more, loaned him some iron, which a creditor attached at the forge. The friendly owner sued in trover for his iron. Choate appeared for him, and pictured the cruelty of the sheriff's proceeding as follows: "He arrested the arm of industry as it fell towards the anvil; he put out the breath of his bellows; he extinguished the fire upon his hearth-stone. Like pirates in a gale at sea, his enemies swept every thing by the board, leaving him, gentlemen of the jury, not so much — not so much as a horse-shoe to nail upon his door-post to keep the witches off." The tears came into the blacksmith's eyes at this affecting description. One of his friends, noticing them, said to him, "Why, Tom, what's the matter with you? What are you blubbing about?" — "I had no idea," was the reply in a whimpering tone, — "I had no idea I had been so much *a-a-bused*!" Nor had he, till Choate told him.

At a trial of a cashier of one of the South Boston banks, charged with embezzlement, Choate, who appeared for the defence, argued that the cashier was compelled to do what he had done by his superior officers, the directors; that *they* had swindled the public; that *they* were the responsible parties, and should suffer the punishment. He was proceeding to flay the directors; when one of them rose in court, and, in great anger, began to denounce Choate, who, hardly allowing himself to be interrupted, said mildly, "I beg the director to be seated, as he wishes to be treated with moderation in a court of justice." And then, instantly breaking out into a scream, and with the greatest impetuosity, he exclaimed, "I tell you, gentlemen of the jury, my client was as helpless in the hands of these directors as an infant surrounded by *ten thousand Bengal tigers*!" I give this as a specimen of the extravagance which Choate sometimes allowed himself. No one, however, smiled: every one looked grave, and full of sympathy for the unfortunate infant thus encircled, and ready to bewail the inevitable catastrophe. It is well known that Choate could say and do things in court that in other men

would have excited shouts of laughter, but which, coming from him, produced no such effect. The reason was his intense earnestness.

Mr. Choate's indifference to money was well known. He undoubtedly lost thousands of dollars by carelessness in collecting, and negligence in charging for his services. The only account-book he kept while I was with him was his office-docket, in which actions were entered by any one in his office who made out a writ. He would sometimes come into the office, and exclaim, "My kingdom for \$500 — for \$400 — \$100! Where does the money go? No matter where. Where shall it come from? That's the question of the hour, the minute. Upon whom shall I make a raid? Let me see." And he would turn to his docket, and, after I had made out a few bills from the particulars given me, receipt them, and ask me to collect them. I seldom found any difficulty in collecting, and no one objected to the charges. Sometimes, when a man did not pay, Mr. Choate would ask me to get his note, which he indorsed, sent to a bank to be discounted, and, at maturity, perhaps had to take it up himself.

He subsequently got a cash-book, and entered, as the first item, "The office debtor to one quart of oil, 37½ cents." The next entry was six months later, and closed the record. I have heard of another account-book, in which the only entry was a debit for the price of the book.

A member of the bar called upon him to induce him to be senior counsel in defence of a man accused of murder, and, in the course of the conversation, stated that his client had no money. "What!" exclaimed Choate, "hands reeking with human blood, and not a cent in his pocket! Outrageous!"

On a very hot day, Mr. Choate was arguing a case at a law term of the Supreme Court, before the full bench. He evidently had the wrong side. Besides other cases against him, a decision of the Supreme Court of Pennsylvania had been cited, which was exactly in point, and conclusive against his positions. He was apparently in the full tide of successful argument, and was approaching its end, when the Chief Justice said, "What do you say to the Pennsylvania case, Mr. Choate?" — "Your Honors, I have not forgotten that case. By no means. I was coming to it directly. By turning to it, you will notice that the decision

was given in the month of July, in the height of the hot season, in the extremely hot town of Harrisburgh, in the interior of the State, far away from the ocean-breezes which here, at this moment, are beginning to fan the heated brow of justice. We all know that Homer sometimes nods; and I submit to your Honors whether it is not indisputable that the judges of the Supreme Court of Pennsylvania—convened in the very heated interior of the State, in the extremely hot month of July, probably on one of the hottest days of that month, and in the *afternoon*, as the report fortunately happens to inform us—were, at the time of pronouncing this abnormal decision on which my brother so much relies, either most of them profoundly asleep, or all ‘nodding, nid, nid, nodding,’ and so not responsible for the strange doctrines laid down.” There was great merriment among the judges, and it was increased by the profound gravity of Choate. The Chief Justice (Shaw) shook his sides till I thought he would roll off his chair.

A story circulated in the office, for the truth of which I do not vouch. I only “tell the tale as ’twas told to me.” A stranger called upon Mr. Choate, and said that he had come to him, as the head of the Suffolk bar, to consult him upon a matter very important to himself. It seems, that, at a hotel, the man had had a dispute with one of the waiters, who finally told him to go to h—l. “Now,” he continued with an air of great importance, “I ask you, Mr. Choate, as one learned in the law, and as my legal adviser, what course, under these very aggravating circumstances, is it best for me, in your judgment, to pursue?” Choate requested him to state again, in order of time, every thing that occurred, and to be careful not to omit any thing, and, when this had been done, remained for a few moments as if lost in deep thought. At last, with the utmost gravity, he spoke: “I have been running over in my mind all the statutes of the United States, all the statutes of the Commonwealth of Massachusetts, and all the decisions of all the judges thereon, and I am satisfied there is nothing in them that will require you to go to the place you have mentioned; *and don’t you go.*” The man, it is presumed, followed this good advice.

A member of the bar tells me, that at the time of the trial of the Tufts Will case, in which Webster and Choate were counsel for the plaintiff, and Samuel Hoar and Augustus Peabody for the

defendant, he was dining at Parker's restaurant, which was then in the basement of the building on the corner of Court Street and Court Square. Webster and Choate were seated at the next table in the public dining-room. Mr. Choate, as junior counsel, had finished his work in the case, and, as usual with him at such a time, was nervous and indisposed, and partook of nothing but tea and toast. Webster, on the other hand, although he was to make his argument in the afternoon, was indulging in beef, ale, and brandy and water, *ad libitum*, and was as comfortable as if he had a month's vacation before him. When the court-house bell rang, Webster went into court, and soon commenced his argument, apparently without having taken any time to prepare it. His first remark, in reference to some rather angry discussion that had taken place, was, "My advice to my brother is, to keep cool; and let him always remember that truth is a pearl to be obtained only in still waters." At its close, Choate came to his office, where he exclaimed most enthusiastically, "The greatest argument Webster ever made! Magnificent beyond even the powerful appeal he made in the Knapp case for the admission of the confession of the prisoner!" Some one then asked Choate what he thought of Jeremiah Mason, who had previously been employed in the Tufts case. "A very great lawyer," he replied; "but he is not *juicy*."

I never saw Choate lose his self-possession in court, except once. He was arguing a case to a jury, Judge Wilde presiding. The judge interrupted him with the remark, "Mr. Choate, the witness did not make the statement you attribute to him." "With your Honor's permission, I will say that I cannot be mistaken. I took down every word the witness uttered, and have it here in black and white, just as I have stated. If your Honor will look at my notes, you will find it so." Turning to the jury, he went on: "Just as I have told you, gentlemen of the jury, the witness testified;" and he then repeated the statement. The judge, again interrupting, said gruffly, "I don't want to look at your notes, Mr. Choate; and, if I did, you know I could make nothing of them. The witness did not say what you state." Then leaning forward, and pointing his finger at Choate, he continued: "You wanted him to say so and so, Mr. Choate, and you did your best to try and make him; *but you couldn't do it*." Choate stood for a few moments silent, evidently embarrassed, and then took up another part of the case.

While I was in his office, he was to deliver an address at Marlborough Chapel, to which admission was to be had by tickets, which were distributed, and not sold. I had thought of asking him for a ticket when he came to the office in the afternoon; but, as he did not make his appearance, I determined, with some hesitation, to apply at his house. I called there, and, on learning that he was at home, requested the servant to ask him if he would be kind enough to let me have a ticket of admission to hear his address in the evening. The servant, soon returning, said Mr. Choate wished to see me. I was shown to his bed-chamber, and, on entering, found him in bed, with a wet cloth around his head, and looking utterly miserable. He said he was suffering from one of his worst headaches, and that he should not be able to go to the meeting that evening. I replied that the people would be disappointed not to hear him, but would be more sorry for the cause. "The doctor says I must not go out. But that is only one side. Don't you think I had better go? I want to hear both sides of the case, or how can I decide it justly? Now, if you say I can go, I think I will. What I want is encouragement." I told him we should all be glad if he were well enough to speak that evening, and could speak without injury to himself; but that I supposed the doctor must be obeyed. "Generally, but not always," he said quickly: "sometimes the patient may deviate with advantage." And then he added, "You will find some tickets on the mantel-piece; take as many as you want: but I warn you not to come to the speech; there's nothing in it." I relate this anecdote to show the pleasant and familiar way in which Choate chatted, — even when very unwell, — and also the power of his will, manifested by his actually attending the meeting, and making a splendid speech under such adverse circumstances. When I went to the Chapel that evening, I did not believe that he had left his bed. As I went up the stairs, I heard his well-known voice; and, on entering the hall, there he was, walking the platform, speaking with all his usual animation and fervor, and sometimes gesticulating with great energy! Not one there, perhaps, but myself, knew that he had but just risen from a sick-bed, to which he would return as soon as he reached home, and where he would pass a most miserable night, for disobeying the doctor.

Mr. Choate was very fond of music, and frequently attended con-



certs. I remember his presence at one which was given in the hall of the Masonic Temple. This was crowded; and the only seat I could obtain was upon a bench against the wall the farthest distant from the stage. While sitting there, I saw Choate's head among the crowd at the head of the stairs, and, catching his eye, made signs that there was a seat for him. I had intended to give up my seat to him, but he would not allow it; and there fortunately happened to be room enough for both. A celebrated English vocalist sang an Italian song in magnificent style, and was rapturously encored. Choate said to me that he wished he would sing "The Star-spangled Banner." I had no means of communicating this wish to the singer, with which I have no doubt he would have willingly complied. In a short time, he reappeared on the stage in answer to the call of the audience, and behaved in such a strange and brusque manner, that I said to Mr. Choate, "The man must be drunk."—"Certainly," was the instantaneous reply: "I smelt his breath the moment he came on." We were only the whole length of the hall distant from him. This humorous exaggeration shows how forcibly and vividly, by a stroke of genius, Choate could stamp the impression he desired to make on the minds of his hearers.

Mr. Choate told a friend of mine that he was going to try to get him an invitation to speak on a certain occasion: "And, if I accomplish it, you may *take the roofs off of six houses.*"

Ex-Governor William Allen of Ohio was a member of the Senate of the United States at the same time with Mr. Choate. This gentleman was remarkable for his stentorian voice,—the most powerful I ever heard, but by no means agreeable. It was a tremendous roar of forty-bull-power. He ought to have been invited to open the Colosseum with a speech. He was once advertised to address the people of the United States from the steps of the capitol in Ohio. He used to stun and split the ears of senators; and Choate remarked that Allen repeatedly violated the Constitution of the United States, which forbade the infliction of "cruel and unusual punishments."

Mr. Choate one day said, "I find that reading an author aloud—giving voice to the emotions suggested by the successive thoughts—augments the former infinitely more than merely *silently* reading the page could do. The intense effect which speaking the words of a page in appropriate tones produces on

me, I am somewhat puzzled to account for. It can be referred, I think, to an effect of sympathy; inasmuch as the tones heard by your own ear, though they come from your own mouth, seem as if produced by a third person." After a slight pause, he added in a low tone, "Certain passages in the orators and poets I cannot read without having goose-flesh all down my back." Let us not smile at the homeliness of the statement. It fully expressed his feeling. Choate never hesitated to use a very common or even slang phrase, if it adequately and forcibly conveyed his meaning; and we are reminded that Holmes, describing his sensations when a lyric conception "hits him like a bullet in the forehead," speaks of the feeling "as of centipedes creeping down the spine."

Every one has heard of Mr. Choate's handwriting, — famous for obscurity. It was impossible for one not familiar with it to decipher the hieroglyphics; and even he himself, when the subject was forgotten, was sometimes at a loss. Whenever I took a note from him to a brother-lawyer, it was thrown down as soon as glanced at, with the impatient remark, "I don't know what that is: what is it?" Sometimes this was said as if it was thought Choate intended to perpetrate a joke upon his brethren.

Shortly after his appointment to the bench of the Supreme Court of the United States, Mr. Justice Clifford, of Maine, was holding a session of the United States Circuit Court in Boston. On account of the necessary adjournment of the court, it was found impossible to hear a case in which Mr. Choate was engaged; and the judge, ignorant of the extraordinary characters which Mr. Choate made to represent the letters of the English language, suggested to both counsel to submit their arguments in *writing*. This proposal created much amusement among the members of the bar, who were doubtless fancying the amazement of the judge when entering upon the perusal of a pile of Choate's manuscript. The hilarity was much increased when Mr. Choate gravely said, as if by way of explanation to the court, "Your Honor observes the smile with which this proposal is received by my brethren: it is all on my account. I write *well* — but *slowly*."

When I determined to go to California, I asked Mr. Choate if he could give me some letters of introduction. He at once replied in the affirmative, and named a time when he would have

them ready for me. I called at the appointed hour ; and there they were, — three letters, — lying on his desk, all prepared for me. He handed them to me, saying that he hoped they would be of use to me ; and then made some remarks concerning California as a new country, observing that it was evidently in a state of violent fermentation, the greed of gold tending to swallow up the nobler sentiments ; that able and upright lawyers were needed in just such a community, to inculcate respect for the law, and to demand a pure administration of justice ; that such men must eventually become influential, and win the respect of the best citizens. He then grasped me warmly by the hand, and said, “ I wish you success, and God bless you.” These were the last words I ever heard from his lips. Soon after my arrival in San Francisco, I delivered my letters of introduction. One was to Mr. Webb of Salem, then mayor of the city. He was delighted to receive a letter from Mr. Choate, and to behold again the mysterious characters. He tried to read it, but was soon brought to a stop ; and I was much amused at being called upon to read my own letter of introduction, with the too flattering adjectives which Choate, in his generosity, had bestowed upon me. Mayor Webb wished me to go with him while he took the letter to show it to some of the other public officers in City Hall ; but I declined doing this, merely giving him a few lessons to make him perfect in the translation of the epistle. He afterwards told me that several members of the bar had been to his office to see the perplexing document, and try to puzzle out its meaning. I had a similar experience with the other letters. They each made a sensation. Choate’s fame had reached California. The admiration felt for him, and the curiosity to see his unique handwriting, made me more acquaintances than I could have gained in any other way. His letters of introduction opened all doors.

Webster truly said that Choate was a wonderful man, — a marvel. He was a compound of opposites. He was a most consummate reasoner, — therefore an admirable logician, — and yet he had also a very exuberant fancy. He was profoundly versed in the law ; acquainted even with the driest parts of it, which his rhetoric touched, and they were covered with flowers, like Aaron’s rod. Looking at him in one aspect, we might say that he was a book-worm ; that his home was his library, for whose “ sweet luxuries ”

he sighed when abroad. But see him in court; and was there ever a better judge of human nature, one more conversant with the details of business, or one who was more a man of the world? His veins at times seemed filled with molten lava: he addressed a jury then as if in a frenzy; every muscle quivered with emotion; the perspiration stood in drops upon his hair; and yet he never once lost sight of the goal at which he was aiming, — success, — and all the time his brain was as cool as if contained in a casket of ice. “His feeling was all intellect, and his intellect was all feeling.” In the management of causes, he had the shrewdest common sense, consummate tact, and unerring judgment; and yet he combined with these practical qualities an exquisite sensibility to the beautiful and the sublime. His imagination vivified whatever it noticed; his wit was playful and pungent; he delighted in ludicrous exaggeration, or in forcing words into a novel service. The activity and alertness of his mind were astonishing. To his profession he was devoted *totis viribus*; as he remarks in his diary, “To my profession of the law and of advocacy, with as large and fair an accompaniment of manly and graceful studies as I can command.” With all the knowledge that his brethren had of Choate’s industry, they were surprised, when his biography was published, to learn that this foremost man of them all, in the maturity of his reputation, habitually studied text-books and reports (aside from particular cases in hand or on trial) with a thoroughness which would have been becoming to a beginner at the bar. To this he added the systematic study of the ancient classics with written translations, of the English classics, of history, and rhetoric, all with a view not only to extend his knowledge and to cultivate his taste, but to increase his stock of English words and felicitous phrases. His mark was high, — to become the first advocate before an American jury, — and he succeeded. Work was the law of his being. If, as Carlyle says, “genius is only an infinite capacity of taking pains,” Choate would, on this account alone, have been the most eminent among mortals. He laid down and followed the rule, “always to try to do his best.”

Mr. Choate, as I have intimated, had a very sensitive poetical temperament. His sensibility was so exquisitely keen, his faculty of expression so quick and copious, that he easily overflowed in a rich, vivid, glowing style, instinct with passion, and colored with

all the hues of fancy, but sometimes extravagant. His *long* sentences remind us of the writers of the Elizabethan age, with their "long-resounding march and energy divine." Some have complained of them for redundancy; but, if examined, it will be found that every adjective, every epithet, is necessary to convey exactly Choate's precise idea as it lay in his own mind, and as he wished to convey it to others. It would be a great mistake to suppose that a man who had studied words so carefully used a multitude of them, because he could not hit upon the right one to express his meaning. If, as has been said, "he drove a substantive and six," every one of the six helped to draw the load. If he played an air with variations which no one else could invent or execute, they did not conceal, but embellish, the theme which was heard throughout, —

"Untwisting all the chains that tie  
The hidden soul of harmony."

It must not be forgotten that all his arguments at the bar were intended to be heard, not read; and that, as he delivered them, every clause was understood, and the general effect which the orator wished to produce was reached at the conclusion of the sentence.

Mr. Choate's ear for music demanded a rhythmical sentence. That might be known from the intonations of his voice, from the pathos and sweetness of his cadences. Indeed, I think one of the secrets of his fascination as a lecturer was his frequently chanting periods in a low, rich voice, that accompanied his thought like the sweet tones of a harp.

Mr. Choate's ambition, I have said, appeared to be to become the great American advocate, — the foremost man of the nation before a jury. For this purpose, he shrank from no labor: he studied law with untiring assiduity; he began a systematic course of reading the best works of the best authors on a great variety of subjects; he "took all knowledge for his province;" and his main object seems to have been to render himself an all-accomplished advocate, — a master of all the keys that can unlock the gates of human passion, and open the doors to conviction. Accordingly, in court, he bent every energy to the task of winning the verdict of the jury. Every thing that he said or did had reference to this object. Every lawyer knows that the most dif-

difficult part of the trial is finished when the argument begins; that is, it lies in the examination and cross-examination of witnesses,—in the efforts to get in or keep out evidence. In all this Choate was pre-eminent. If his opponent was a man of ability, the tilt between them was equal in interest to the most skilful fencing-match. His “acting,” during the trial of a difficult case, was consummate,—equal to any performance on the stage. He identified himself with his client; so that it was disparagingly said that the latter, for the time, “owned him, his aspiration, his respiration, his inspiration, and his perspiration.” But this was not true: Choate never lost himself in his client, who always had the advantage of his sagacious brain and professional skill. I think he felt but little interest in the client, who was forgotten almost as soon as the case ended: his interest was in the trial,—the game,—and in winning it as if it were a game of chess.

*A priori*, one would have said that no such style of speaking as Choate’s would be tolerated in a Massachusetts court of law, it was sometimes so violent, so frantic, so extravagant. When greatly excited, he appeared to be almost in convulsions, every fibre in his body quivering with emotion, his face ashy pale, his eyes flashing, his gestures most violent; and he would shout, and even scream, with all the force of his lungs. He did not, “in the very torrent, tempest, and, as I may say, whirlwind of his passion, beget a temperance that gave it smoothness.” Like a high-mettled steed, he was off at a tremendous rate from the word “Go!” and he kept up or increased the pace to the end of the course. When I have seen Choate employ two extraordinary instruments of expression,—*his nose* and *his heels*,—drawing in the whole volume of his breath through his large nose with a noise heard all over the room,—and then, to double the force of this expression, closing his sentence by coming down on his heels with a muscular effort which shook the whole court-room; when I heard of his tearing his coat from top to bottom by the violence of his gestures,—I was pleased at reading that a gentleman in England told Choate that he had frequently seen Erskine, in addressing a jury, *jump up and knock his feet together* before he touched the floor again.

I believe it must be admitted that Choate did not think that truth lies in *still* waters. He appeared rather to be of opinion



that it was a goblet of gold cast into a furious and foaming whirlpool, — as in Schiller's ballad, — into which he who would rescue it must plunge, and contend for it with the raging waters ; and so, like the daring youth in the story, he would leap into the boiling, hissing, frightful vortex, pluck from its dark womb the golden prize, bear it with upraised hand through surging billows and assailing enemies back to the welcome shore, and place it in the hands of the virgin goddess, Justice, to give to its rightful owner.

Many of these traits which I have described would have been fatal to anybody else ; but in Choate they had the stamp of originality. They sprang from his very nature. His style of speaking was genuine, was his own, was natural to him, and, being so, had the force and effect of whatever is true and spontaneous.

His courage always rose with the emergency. The blacker things looked for his client, the more unflinchingly he stood by him. To lose heart then, — nay, to falter for an instant, — would, to him, have been like fleeing from the field of battle on account of a panic. His theory of a court of justice appeared to be, that it is an arena upon which the champions of both parties contend, under the direction of the judge, each doing his best ; and that in this way the righteous side will be made manifest. He was never to desert a client, but let the jury judge him. So, when court, counsel, witnesses, every thing, were against him, and he seemed to have gone down before his foes, and lying under their feet, suddenly I have seen him reappear, shaking his terrible locks at his assailants, scattering them before him with one sweep of his arm, and, holding aloft his flag, carry it, like the white plume of Navarre, in safety through the hard-fought field, and wave it in triumph at the termination of the fierce conflict.

It has often been said that the great actor's work dies with him. Who shall preserve from oblivion that magic of voice, that charm of form, of look, of gesture, through which his soul has spoken to his fellow-men with such resistless eloquence ? His excellence may linger long in the traditions of the world ; but he remains the shadow of a mighty name. It is so with the orator in respect to his manner of delivering his speeches. It is true that the ability of the great orator may be recognized in his orations.

We may read them with eyes suffused with tears, and with hearts thrilled as by a trumpet-blast, and to some extent perceive and appreciate the causes of his wonderful power in swaying at will multitudes of men ; and yet we exclaim, " Would that we could have heard the great orator himself deliver these noble passages ! " " 'Twere worth ten years of peaceful life " to have heard Demosthenes speaking for the crown ; or Cicero pleading for the citizenship of Archias ; or Mirabeau shouting, " If I shake my terrible locks, all France trembles ! " or Burke or Sheridan at the trial of Warren Hastings ; or Webster in reply to Hayne ; or any great orator in his most impassioned moments. " True eloquence must exist in the man, in the subject, and in the occasion ; " most of all, in the *man*. Therefore we desire to stand in the personal presence of the great speaker ; to behold " the sea of upturned faces ; " to sympathize with the excited multitude ; to read the importance of the occasion in all eyes ; to hear the tones of that wonderful instrument, the human voice ; to observe the graceful or vehement gesture ; to mark " the high purpose, the firm resolve, the dauntless spirit, speaking on the tongue, beaming from the eye, and urging the whole man onward, right onward, to his object. " Not by reading him in the closet, but by hearing him in the public assembly or the forum, do we know the great orator, and understand what Demosthenes meant when he said that the first, second, and third requisite of an orator is " action, action, action ! " meaning thereby every bodily element of expressing his thought.

The great lawyer and advocate is even worse off than the great public speaker in respect to posthumous fame, because few but professional men read or understand or care for arguments delivered before a court of law. The fame of such men as Pinkney, Dexter, and Choate, as forensic orators, is even now traditional.

Three most eminent orators have appeared in this country during this century, all born in New England, and all of national reputation, — Webster, Everett, and Choate ; Webster and Choate distinguished in the public assembly, at the bar, and in the senate, and Everett in the first arena. If asked in which sphere each was pre-eminent, I should answer, " Webster in arguing a very important and complicated question of constitu-

tional law, Everett upon the academic and popular platform, and Choate before a jury."

The name of Rufus Choate suggests the names of his distinguished contemporaries; and I may be excused for a brief notice of them as orators, as I happened to hear them all in their best moments.

If any man could be said to wield thunderbolts, it was Webster in his most vigorous days. He was then sometimes "the sea in a storm:" in his later days, he was "the sea in a calm." In the latter period he was slow, unimpassioned, deliberate; in manner like a very good reader. In his prime, when he became interested in the discussion of some important topic, and was warmed by the subject, or simply by the action of his own mind, his elocution was various, animated, and powerful. He had at times, also, a third manner, as different from either of the others as if it were that of a different man. This was when he was thoroughly roused and excited by opposition, or wrought up to the highest pitch by his intense interest in the subject. He was then very vehement, and poured forth a torrent of words; his voice was loud, and on a high key; his gestures perpetual and violent; his face alternately flushed and pale. He overwhelmed and oppressed as well as convinced. A clergyman, who heard him in the Massachusetts Convention in 1820, told me, that, in one of his speeches there, Webster was like a raging lion. The contrast between this and his latter manner was remarkable.

It was my good fortune often to hear Webster at Faneuil Hall in his palmy days. I have seen him when every nerve was quivering with excitement, when his gestures were most violent, when he was shouting at the top of his clarion voice, when the lightnings of passion were playing across his dark face as upon a thunder-cloud. I marked the terrible effect, when, after repeated assaults—each more damaging than the preceding—upon the position of an opponent, he launched with superhuman strength the thunderbolt that sped straight to its mark, and demolished all before it. The air seemed filled with the reverberations of the deep-mouthed thunder.

In a speech which he delivered in Boston shortly after "nullification" times, I remember his referring to Hayne's speaking of "one Nathan Dane." Mr. Webster always considered Dane as the author of the celebrated North-western Ordinance, by

which that large territory was consecrated for ever to freedom. He exclaimed very scornfully, "Mr. Hayne calls him *one* Nathan Dane! I tell you, fellow-citizens, that, as the author of the North-western Ordinance, Nathan Dane's name is as immortal as if it were written on yonder firmament, blazing for ever between Orion and the Pleiades."<sup>1</sup> It is impossible to give an idea of the effect which Webster's delivery of these words produced. Throwing back his head, raising his face towards the heavens, lifting both arms in front of him, and pointing upwards to the overarching sky, so magnificent was his attitude, and so thrilling the tones of his voice, that we almost seemed to see the starry characters shining in eternal lustre upon the firmament. The effect was sublime. I have never seen it equalled upon the stage,—not even by the greatest actor.

Everett was a graceful, persuasive, delightful, mellifluous speaker. We were borne along upon the stream of his eloquence as upon a beautiful river springing from the Delphian Parnassus sacred to Apollo and the Muses; wandering through classic groves,

"Where the Attic birds  
Trill their thick-warbled notes the summer long;"

by Athens, mother of arts and eloquence, and past the glories of its Acropolis; by flowery Hymettus and its murmuring bees; lingering by battle-fields where man gained immortality by dying for truth and country; meandering through Arcadian pastures dotted with flocks and herds,

"With lasses chanting o'er the pail,  
And shepherds piping in the dale;"

flowing through the plains of sunny Italy, and by the walls of imperial Rome; sweeping through pathless forests, listening to the whispering pines, and catching the faint sound of the settler's axe as he clears an opening in the wilderness; now spreading out into a beautiful lake, in whose serene bosom are reflected the fairest scenes of earth and sky; then narrowing its course, and running, with shuddering waters and impetuous torrent, through some

<sup>1</sup> Mr. Winthrop, in his oration on the last Fourth of July, states that Mr. Webster made use of this grand figure in reference to John Hancock's signature of the Declaration of Independence. I myself heard Webster, in Faneuil Hall, apply it to Mr. Dane.

dark ravine, fit place for wholesale murder in a tyrant's cause ; and again, escaping, and welcoming the free heavens and the gladsome light with a tuneful ripple in which is always heard the song of the infant brook learnt far up among the misty mountain-tops ; then, rolling with deeper, stronger current, by storied castles and ivy-mantled towers, murmuring their legends of love and glory ; until at last, swollen into a broad, deep, swift, and majestic river by countless tributaries from every clime and country, and bearing on its breast "the solidest treasures of human wisdom and the fairest harvests of poesy and wit," the voyage is, alas ! too soon ended, even while we exclaim, "Flow on for ever, beautiful river, still for ever flow thou on," and its voice of many waters is lost in the murmurs of the all-receiving sea.

During the jubilee held in Boston on the occasion of the completion of certain railroads, a dinner was given to all the guests in a large tent on the Common. Mr. Everett was invited to speak ; and his subject was, of course, railroads. After mentioning the objections sometimes made to them, — that passengers cannot enjoy the scenery, however beautiful, through which they are whirled at great speed, — he said, "But let us see whether, on the other hand, there is not a great compensating advantage to the denizens of the country ;" and then, in illustrating this idea, he gave a description of the coming in of the ground-swell of the ocean upon the shore, in which the words and the clauses, as delivered by him, sounded like the march of the mountain-wave itself. I think there is nothing of its kind, in prose, superior to it in the English language. He said, —

"But for the much greater cheapness of transit on railroads, how many thousands might be obliged to spend all their lives in the country, without ever being able to visit the sea-coast, and to behold that most magnificent of all spectacles, a glorious combing wave, as in long line it slowly approaches the shore, gradually rising higher and higher, until at last, its green crest bending over in the most graceful of all curves, it *dashes* into snow-white foam, and runs and spreads and dies along the *whispering* sands !"

The voice of the orator had a dying fall, that melted into silence with the dying wave. I heard exclamations of "Beautiful, beautiful !" all around me ; and a thrill of delight ran all over the immense audience, as a field of wheat bends and ripples before the breeze.

When Sir Joshua Reynolds delivered the last of his discourses before the Royal Academy of Art, Edmund Burke went up to him at the close of the lecture, and said to him, in the words of Milton, —

“The angel ended, and in Adam’s ear  
So charming left his voice, that he awhile  
Thought him still speaking, still stood fixed to hear.”

Everett related this anecdote, and complimented Choate by applying these lines to him. This compliment, probably the most exquisite ever paid to any speaker, was equally merited by Everett himself. I have known a vast audience, for some moments after he ceased speaking, stand hushed in the deepest silence, as if still spell-bound by the sweet strains of his eloquence, and intently listening to catch their faintest echoes.

How truly these words in Dr. Johnson’s epitaph on Goldsmith apply to Everett! —

“Nullum quod tetigit non ornavit.  
Affectuum potens, at *lenis* dominator;  
Ingenio sublimis, vividus, versatilis;  
Oratione grandis, nitidus, venustus.”

Mr. Choate was very different, as an orator, from either Webster or Everett. He was entirely *sui generis*. I have said that in court his whole object was to make the jury believe in him and his client. To that one end all his energies were devoted; and so successful was he, that no jury returned a verdict against him without wishing that it had been possible for them to render it the other way. I have sometimes entered the court-house, and, ascending the stone stairway, heard Choate screaming with all his might. I have said to myself that he was “tearing a passion to rags, — to very tatters,” — and that I would not be affected by him; and yet in a few minutes I would find myself coming under the influence of the magician’s spell, and soon yielding to the charm altogether. There was certainly a personal magnetism about the man which produced strange effects. We stood upon enchanted ground. At the wave of his magic wand, vapors appeared to ascend from the earth and affect the brain, and we saw visions. We were living in another world: we had lost our hold of the “sure and firm-set earth,” and would not have been surprised at any moment if it had opened and filled the air with the most splendid coruscations.



The great secret of the power of Mr. Choate's eloquence was his intense earnestness, arising from his emotional nature, so that he seemed to feel every word he uttered. Subsidiary to this—at times relieving and at times deepening its effect—were all the rich gifts and accomplishments which he possessed.

In his speech on the Judicial Tenure, in the Massachusetts Convention (1853), after saying that the judge must be honest, upright, and impartial,—no respecter of persons,—he pronounced this noble sentence, in his most impressive tones, amid the breathless attention of all around him:—

“If Athens comes before him to demand that the cup of hemlock be put to the lips of the wisest of men, and he believes that he has not *corrupted the youth nor omitted to worship the gods of the city, nor introduced new divinities of his own*, he must deliver him, although the thunder light on the unterrified brow.”

It may be added that Mr. Choate, in this most eloquent speech, delivered by him when he was almost prostrated by sickness, carried the convention with him.

Every writer who attempts an essay upon Mr. Choate expresses disappointment at not being able to give a better idea of this strange and incomprehensible orator to those who never heard him. But how can he expect to succeed? Can an idea of Jenny Lind's singing be conveyed to those who have not heard her? Who would undertake to describe Paganini's playing to those who had never listened to the performances of the marvellous violinist? Indeed,—I say it in no disparaging sense,—Choate appears to me to have been the Paganini of advocates, I refer merely to the delivery: as unique, as weird, as mysterious, as eccentric, as wonderful and inexplicable a phenomenon in oratory, as Paganini was in music. There was also some personal resemblance between the two men,—in nervous organization, in the spare habit of body, in the sad expression of the haggard countenance when in repose, in the blazing eyes when excited.

No one who was well acquainted with Mr. Choate can read without tears the touching passage in the letter of Mr. Hillard—almost his lifelong friend—from on board the Cunard steamer in which Mr. Choate had taken passage for Europe, in the hope of recruiting his health. Mr. Hillard writes, “From the moment I first looked upon him, on the morning of the day that we

sailed, I felt assured that the hand of death was on him. He was always lying at full-length upon the sofa, and perfectly quiet, though not reading, or listening to reading. This in itself, in one with so active a brain and restless an organization as his, was an ominous sign." It is well known that Mr. Choate, being unable to proceed on the voyage, was landed at Halifax, where, on the 13th of July, 1859, he died in a room from whose window he had, almost to the last, looked upon the sea, by the side of which he was born, and which he had so long and habitually loved.

The sorrow for his death was deep and universal. Every one felt "what shadows we are, and what shadows we pursue," when he knew that the eloquent tongue was silent, the flashing eye closed, the teeming brain become a clod of the valley, and that a life which had been so full of energy and splendor, so crowded and crowned with intellectual achievements and triumphs, had passed away for ever like a vapor. The lines of Wordsworth, quoted by Mr. Choate in his eulogy upon Harrison, recurred: —

"Whither is fled the visionary gleam?  
Where is it now, the glory and the dream?"

But, turning now from his professional career, with all its renown and lustre, what consolation do we derive from the beautiful traits of his private character! — his modesty and amiability; his utter freedom from envy or vanity; his courtesy to every opponent, and hearty appreciation of his merits; his kindness and generosity to all the younger brethren; the simplicity and sweetness of his nature; his love for the pure and honorable, and for the fame which follows, not that which is run after.

He has "put off this mortal, and put on immortality." He lives, and will for ever live, in the affections of relatives and friends, in the remembrance of his many virtues and brilliant qualities, in the love and admiration of his professional brethren, in the gratitude of many to whom he spoke the encouraging word and extended the helping hand, and in the annals of the country which he loved and cherished with his whole heart.

GEORGE W. MINNS.

## ON THE TRIAL BY JURY.

## ITS ORIGIN.

THE institution of the jury has always been the object of extraordinary interest, and it has been treated from every possible point of view. In addition to the question of its general utility, the extent of its applicability, and the most practicable form to be assigned it in the economy of judicial procedure, the question of its origin, its historical explanation, has always possessed a lively interest for critical minds among both jurists and historians. Nevertheless, it has always proved a baffling one, and legal writers have been obliged to content themselves with saying that the origin of the institution is "so remote, that it has not hitherto been satisfactorily traced."<sup>1</sup> The labors of Reeves, Hallam, Palgrave, Starkie, and Forsyth, have done much to throw light upon its earlier history in England, and to correct popular errors concerning it; but not even Palgrave was able to speak the final word upon the question of its origin. As the modern jury was confined, until the era of the French Revolution, to the English system of procedure, and those systems, like our own, derived from the English, the investigations into its origin and history were chiefly confined to English scholars. When, however, as one result of the French Revolution, the jury system was introduced into France, including the French Rhenish provinces, occasion was given for a vast amount of writing upon it, both dogmatical and historical. The prevailing notions of the epoch, however, full of contempt for the past as they were, were calculated to hinder effectually any thing like a just appreciation of an institution having its roots so unqualifiedly in the past as trial by jury. The result of this state of mind appeared in the mongrel form of the jury, for criminal cases only, which was ingrafted upon the French national procedure. The example of France, and the fact that the Rhenish provinces continued the use of the criminal jury after they had thrown off the yoke of Napoleon, served to call the attention of the rest of Germany to the institution as a means of remedying the abominable system of procedure then in force there.

<sup>1</sup> Stephen, *New Com.* (partly founded on Blackstone), lii. 578, 7th ed.

Accordingly, in the changes consequent upon the political disturbances of 1848-49, a more or less exact copy of the French criminal jury was introduced into the judicial systems of most of the states of Germany. This movement was accompanied by extraordinary literary activity on the part of the German jurists, having for its object the nature, and especially the origin and history, of the novel institution, and not a few of the greatest names of Germany are to be found among the authors of the articles in legal reviews, monographs, or more voluminous works, devoted to a solution of this interesting question.

The unification of the German States by the formation of the German Empire raised afresh the question of the formation of a uniform system of procedure; and prominent among the features of the schemes proposed looking to that end is the introduction of the civil jury.<sup>1</sup> While, therefore, in this country, there are unmistakable signs of dissatisfaction with the working of the civil jury,<sup>2</sup> the most distinguished jurists of Germany are advocating its incorporation into their own system of procedure substantially as it exists in England and in this country.

As though to aid and illustrate these propositions for the wider practical application of the institution, German scholarship has made a very valuable contribution to the whole subject in the work of Brunner, on the *Origin of Trial by Jury*,<sup>3</sup> a work of which it is not too much to say, that it has put a new phase upon the question, and rendered necessary the rewriting of all the historical literature on the jury.<sup>4</sup> Before giving its results, it will be

<sup>1</sup> See, for example, the *Verhandlungen des 9ten deutschen Juristentages*, vol. ii. pp. 317, 334, *et seq.*

<sup>2</sup> The Harvard Law School signalled its admission as an integral part of the University this year by a thesis, by a *Candidatus Iuris*, on "The Argument against requiring Juries to be Unanimous in Civil Cases." From a similar motive spring the various proposals for the establishment of commercial courts (*Handelsgerichte*), like those of the Continent, and the laws like that of Massachusetts (Laws of 1874, c. 248), by which the court may require all cases desired to be tried by jury to be entered on a separate list under certain regulations as to time, &c.: i.e., all causes are tried, as of course, without jury; but, if a jury is wanted by a party, he can have one by taking certain positive steps to secure it. It is said that the result of this regulation has been greatly to diminish the number of jury-trials.

<sup>3</sup> *Entstehung der Schwurgerichte*, Von Dr. Heinrich Brunner, Berlin, 1872.

<sup>4</sup> The New York publisher of a reprint of Forsyth's *History of Trial by Jury* as a "new edition by William Appleton Morgan, Esq.," under date of 1875, seems to have thought otherwise. The appearance of Mr. Forsyth's valuable work a quarter of a century after its original publication, with no intimation of its proper date within its four corners, and no allusion to the intervening literature, gives it a singularly anachronistic air.

worth while to glance at the numerous opinions which have heretofore been put forth from time to time, and which mark the advances made in the solution of the question.

It is well known that the present form of the jury had its origin in England. The jury, with its present functions, reaches back to about the middle of the sixteenth century, and from that date its history has been more than once sketched. It is then only with the origin of that judicial germ out of which, in strict historical process, the jury has developed, that we have to do.

If this germ had its origin in England, we must look for it in the Celtic or Welsh folk-laws; in the judicial system of the Anglo-Saxons; or, finally, in the Anglo-Norman system built up after the Norman conquest. All of these theories have had their advocates. The first view was suggested and maintained by Sir Richard Philipps,<sup>1</sup> and more minutely set forth by Probert. According to the latter, it was Asser, the Welsh bishop, who got the ear of King Alfred, and persuaded him of the utility of the institution.<sup>2</sup>

The derivation from the Anglo-Saxons is deserving of more consideration. Until the time of Reeves, it was the generally accepted opinion in England that the jury was to be referred to the Anglo-Saxons. The popular belief, adopted also by some writers, was, that it was a creation of Alfred, a derivation now long accepted as purely mythical.<sup>3</sup> A general Anglo-Saxon origin is asserted by Sir Henry Spelman,<sup>4</sup> and by Selden,<sup>5</sup> among the older writers; and by Coke,<sup>6</sup> Turner,<sup>7</sup> and Blackstone,<sup>8</sup> among more modern authors. G. L. v. Maurer<sup>9</sup> thought the English jury of Anglo-Saxon origin, and conceived that it grew

<sup>1</sup> On the Powers and Duties of Juries, p. 319.

<sup>2</sup> The Ancient Laws of Cambria, pref. p. 4: "They (the Welsh Triads) induce us to conclude that the Saxons did not bring this inestimable privilege with them from the extensive forests of Germany, but derived it from the eternal blue hills of Cambria."

<sup>3</sup> Hale, Hist. of Com. Law, 174, 386, n. A, 6th ed.; Hume, Hist. Eng., i. c. 2. Finlason, however, Pref. to Reeves, Hist. Eng. Law, p. lxii, does not hesitate to quote the *Mirror's* account of Alfred's hanging several judges for condemning the prisoner "where the jury were not unanimous, or were in doubt."

<sup>4</sup> Glossarium Archæologicum, in verb. Jurata.

<sup>5</sup> Analecton Anglo-britannicon, l. ii. c. 6.

<sup>6</sup> 8 Rep., pref. p. xi.

<sup>7</sup> Hist. of the Manners, Landed Property, Government, &c., of the Anglo-Saxons, b. v. c. 9.

<sup>8</sup> Com. iv. c. 33. See, however, Com. iii. c. 23.

<sup>9</sup> Geschichte des altgermanischen . . . Gerichtsverfahrens, 107-110.

out of the system of compurgators, working, however, in conjunction with the assumed Anglo-Saxon institution of the Frankpledge.<sup>1</sup> Phillips, in his *History of the Anglo-Saxon Law*,<sup>2</sup> in answer to the question, Was the jury known to the Anglo-Saxons? decides that the first instance of trial by jury in England is that between Gundulph and Pichot, given by Hickes,<sup>3</sup> in the time of William the Conqueror. In a subsequent work, however,<sup>4</sup> he says, that from the undeniable resemblance of the *iuratores* with the compurgators, on the one hand, and with the old German lay, or popular judges or deciders, called Schöffen, on the other, it seems not improbable that the institution of the jury in England was derived from a gradual union of these two; and he seems disposed to conclude that this union first took place among the Anglo-Saxons.<sup>5</sup> Wilhelm Maurer found what seemed to him indications of the jury among the Anglo-Saxons, which he set forth in his treatise on Anglo-Saxon Mark-Courts.<sup>6</sup> Sir Francis Palgrave, a great authority, concluded, that although "in criminal cases the jury appears to have been unknown until enacted by the Conqueror," yet the trial by sworn witnesses employed by the Anglo-Saxons in the decision of rights of property may be considered the judicial germ of the jury in civil cases.<sup>7</sup> Forsyth expressly denied the existence of the jury among the Anglo-Saxons, and he places the era of its origin a century after the conquest.<sup>8</sup> He thought it "capable almost of demonstration," however, that the English jury was of indigenous growth, and was not copied nor borrowed from any of the tribunals that existed on the Continent;<sup>9</sup> and he was "persuaded that the rise of the jury system may be traced, as a gradual and natural sequence, from the modes of trial in use amongst the Anglo-Saxons and Anglo-Normans, both before and

<sup>1</sup> Von Maurer, Ueber die Freipflege, 1848.

<sup>2</sup> Versuch einer Darstellung des angelsächsischen Rechts, § lix.

<sup>3</sup> Textus Rossensis, Thea. Diss. Epis., p. 88 *et seq.*

<sup>4</sup> Englische Reichs- und Rechtsgeschichte, ii. 287.

<sup>5</sup> See Nicholson, Præf. ad Wilkins. ed Leg. Anglo-Sax., p. ix *et seq.*

<sup>6</sup> An Inquiry into Anglo-Saxon Mark-Courts, and their Relation to Manorial and Municipal Institutions, and Trial by Jury. See same in Zeitschrift für deutsches Recht, xvi. 201 *et seq.*

<sup>7</sup> The Rise and Progress of the English Commonwealth, i. 256, 248; ii. p. cxcii *et passim*. It is to Palgrave that we owe the first instructive presentation of the subject to be found in English.

<sup>8</sup> History of Trial by Jury, c. iv. sect. 1, 1858.

<sup>9</sup> Id., c. i. sect. 2.

after the conquest.”<sup>1</sup> Analogous to the opinion of Forsyth appears to have been that of Cock,<sup>2</sup> who considered the jury as a result of Norman forms ingrafted upon the procedure in the Anglo-Saxon popular courts, and that the germ of the institution was to be found in the latter. As supporting a purely Anglo-Norman origin is to be mentioned that serviceable and voluminous writer on the jury, Biener, in his first work touching this subject.<sup>3</sup> He grounded his conclusion of an indigenous origin on the fact that the institution appeared much more sharply defined and regulated in England than as found in Normandy; and the Norman forms of procedure appeared to him, as to Forsyth, only a not very exact copy of the English.<sup>4</sup>

If, on the other hand, the jury was not indigenous to England, whence, and by whom, and in what form, was it brought thither? Four ways are conceivable, all of which have had their supporters. The jury may have been introduced by the Roman conquerors of Britain, by the Danish invaders, by the Saxons, or, lastly, by the Normans. The first theory is not of great age, and owes its origin to Finlason, who supports it in his edition of Reeves's *History of the English Law*.<sup>5</sup> He is probably the only representative of this theory. The Danish derivation was suggested by Wormius,<sup>6</sup> and revived in modern times by the Dane Worsaae, in his *Danish Conquest of England and Normandy*.<sup>7</sup> Incidentally, also, no less an authority than Konrad Maurer<sup>8</sup> intimates his belief in the Danish origin of a passage in the laws of Ethelred, which seems to point to a jury of accusation more

<sup>1</sup> History of Trial by Jury, c. i. sect. 1.

<sup>2</sup> Henrici Cock Commentatio de Iudiciis Iuratorum, Lugd. Bat. 1821. See review of this prize-essay in the *Hermes*, 1822, i.; Biener, Beiträge zu der Geschichte des Inquisitionsprocesses, und des Geschwornengerichts, p. 287.

<sup>3</sup> Beiträge zu der Geschichte des Inquisitionsprocesses, und des Geschwornengerichts, 282-3.

<sup>4</sup> “Das normännische Verfahren erscheint mehr als eine freiere Nachbildung, welche die Hauptideen festhält,” id. p. 282.

<sup>5</sup> Reeves, History of the English Law, pref. pp. xviii-xxii, p. 187, n. b. See Biener, Das englische Geschwornengericht, i. p. 14. For a possible distant connection of the jury with the Roman law through the summary processes of the latter in matters of the imperial treasury, see Palgrave, Eng. Com., i. 271; Brunner, Schwurgerichte, 87 and n. 1; Stubbs, Con. Hist. Eng., i. 618, 2d ed.; with reference to Cod. Theod., x, 10, l. 11; x, 8, l. 2; x, 10, l. 29.

<sup>6</sup> In Danicorum Monumenta, l. i., c. 10, p. 91 et seq.

<sup>7</sup> See Göttinger Gelehrte Anzeiger, No. 46, p. 1675 (1866); Brunner, Entstehung der Schwurgerichte, p. 14.

<sup>8</sup> In the Kritische Ueberschau, v, 389 & n. 2.

undeniably than any other passage in the laws of the Anglo-Saxon period.<sup>1</sup>

The supporters of the theory, that the jury was brought into England by the Anglo-Saxons, hold also to the opinion, more or less rigorously supported by proof, that the original of the institution was one common to the whole Germanic race, and was in process of time lost among other peoples, and developed alone among the Anglo-Saxons on English soil. Blackstone says that "the general constitution of this admirable criterion of truth, and most important guardian both of public and private liberty, we owe to our Saxon ancestors;"<sup>2</sup> and that "we find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France, and Italy."<sup>3</sup> Montesquieu says, with characteristic vivacity, that the English jury was found in the German woods.<sup>4</sup> Mythical explanations are not wanting again here. The ecclesiastic Nicholson traced the institution back to a decree of Odin himself, and gives many interesting particulars.<sup>5</sup> A German *savant*, with characteristic accuracy, fixes the date of this decree for the year 100 B. C.<sup>6</sup>

Those who have derived the jury from the Germanic races have generally sought to show that its germ existed in some portion of the system of procedure in force among those peoples, and that in course of time, by a process familiar to students of judicial institutions, it has been transformed by successive changes into its present form. Savigny, in referring to the distinction between the German *Schöffen* and the Roman *iudices*, in that the former decided both law and fact, and the Graf merely presided, while in Roman procedure the labor was divided between the *magistratus* and the *iudices*, says it is very remarkable that the English jury, which so

<sup>1</sup> Laws of Ethelred, Conc. Wanetungense, iii.; Schmid, Gesetze der Angelsachsen, 218; Thorpe, Anc. Laws and Inst. of England, i. 392-396.

<sup>2</sup> Com. iv. c. 83.

<sup>3</sup> Com. iii. c. 23. See Millar, Historical View of the English Government, vol. i. p. 187 *et seq.*, 328 *et seq.*; Le Grand de Laleu, Recherches sur l'Administration de la Justice criminelle chez les Français, etc., 163 *et seq.*

<sup>4</sup> Esprit des Lois, l. xi., c. vi.; l. xxx., c. xviii. Nath. Bacon, Discourse on the Government of England, c. 28. Cock, followed by Brunner, attributes the Discourse to Lord Bacon himself.

<sup>5</sup> Præf. de Iure feudali veterum Saxonum, ad Wilkins., Leg. Anglo-Sax., p. xi.

<sup>6</sup> Dr. Kletke, editor of Blankensee, Schwurgerichte, 1848. He says one may well conclude "dass Odin um das Jahr 100 vor Christi Geburt der Stifter der nordischen Reiche, auch der Stifter der Geschwornengerichte war," p. 53.



naturally appears to have arisen out of the Germanic Schöffen courts, in this important point agrees rather with the Roman than with the Germanic system, a fact which he declared himself unable to explain.<sup>1</sup> Jacob Grimm also found an incontestable connection between the German Schöffen and the English jury.<sup>2</sup> Subsequently, however,<sup>3</sup> Grimm seems to have accepted as his own the theory of Phillips, already given,<sup>4</sup> of a combination of Schöffen and compurgators. The theory of Rogge was, that the jury was simply a transformation of the system of compurgators.<sup>5</sup> The jury of accusation he derived from the compurgators called by the accuser to substantiate his complaint, the trial-jury from the compurgators of the accused produced by him to support his defence.<sup>6</sup> The theory of Rogge was substantially adopted by Gundermann.<sup>7</sup> Michelsen derived the jury from the compurgators of the Anglo-Saxons, modified by the institution of the ordeal, an idea peculiar, probably, to this author. The germ of the jury was not peculiar to the Anglo-Saxons. Michelsen found it common to all the races living around the North Sea. Among some of them it died out in the middle ages, among others in the sixteenth and seventeenth century, and preserved itself alone in England.<sup>8</sup>

Köstlin's<sup>9</sup> theory seems to have been that the jury is the out-

<sup>1</sup> Savigny, *Röm. Recht im Mittelalter*, 2d ed., i. 258, n. h. See Leue, *Das Schöffengericht*, 275 *et seq.*; the academic essay of Reynolds, *De vera iudicii iuratorum origine, natura et indole*, for an attempt to explain the difficulty raised by Savigny.

<sup>2</sup> *Deutsche Rechtsalterthümer*, 2d ed., p. 785 *et seq.*: "Daraus folgt aber ein unverkennbarer Zusammenhang zwischen den altdeutschen Urtheilern und dem heutigen Geschwornengericht in England und Frankreich."

<sup>3</sup> *Id.* p. 956.

<sup>4</sup> *Englische Reichs- und Rechtsgeschichte*, ii. p. 287.

<sup>5</sup> *Gerichtswesen der Germanen*, § 44, p. 242.

<sup>6</sup> Rogge's work is cited by Forsyth, and is by him quite incorrectly accredited with the support of the Schöffen theory. *Hist. Trial by Jury*, c. i. Rogge's idea is one step in advance of that theory, inasmuch as, in archaic process, compurgation was a method of proof, as was the jury during many centuries of its existence. Rogge's words are, "Die gewöhnliche Theorie und auch die Meinige ist, dass das Geschwornengericht aus dem Institute der Eideshelfer hervorgegangen ist," *id.* p. 242.

<sup>7</sup> *Entstehung der Jury in England*; *id.* *Englisches Privatrecht*; *id.* *Ueber die Einstimmigkeit der Geschwornen*. So perhaps Spence, *Inquiry into the Origin of the Laws and Political Institutions of Modern Europe*. But see *id.*, p. 200.

<sup>8</sup> Michelsen, *Ueber die Genesis der Jury*, p. 166, *et passim*. See Wilda, in *Verhandlungen der Germanisten zu Lübeck*, p. 251 *et seq.*: *Ueber den Ursprung der Geschwornengerichte*.

<sup>9</sup> *Wendepunkt des deutschen Strafverfahrens*; *Das Geschwornengericht für Nichtjuristen dargestellt*; *Die Entstehung und Fortbildung der Jury auf englischem Boden*, in *Zeitschrift für deutsches Recht*, xii. 406.

growth of a union of compurgators, and the formal method of proof by witnesses (*Zeugenbeweis*), under the old German procedure; while, according to Rintel,<sup>1</sup> still another element was necessary, and the jury sprang from a combination of *Schöffen*, compurgators, and formal witnesses.

The early character of the jury as a body of witnesses, first made clear through the labors of Palgrave,<sup>2</sup> and familiar to us since his time, was first elucidated in Germany by Biener,<sup>3</sup> and was afterwards recognized by Homeyer, who found the precursor of the jury in the institution of community or neighborhood witnesses as existing among the Anglo-Saxons,<sup>4</sup> thus favoring the general Germanic origin of the jury, and its introduction into England through the Anglo-Saxons.

The introduction of the jury into England from the Continent, by way of Normandy, has had an equally distinguished support. Palgrave thought the criminal jury, at least, of Norman origin,<sup>5</sup> and before him Reeves, who generally reflects in his work the best opinion of his time, had already adopted the theory of a derivation by way of Normandy.<sup>6</sup> On the authority of Hickee,<sup>7</sup> the only one of the older writers favoring the derivation from Normandy, Reeves adopted the theory that the Normans acquired the institution from their Northern home. The authority followed by Hickee was, in turn, Saxo Grammaticus, in whose work oc-

<sup>1</sup> Von der Jury . . . ihre Geschichte, etc., 1844.

<sup>2</sup> See also Hallam, Europe during the Middle Ages, 12th ed., ii. 283, 385, 390; Mackintosh, Hist. Eng., i. p. 278.

<sup>3</sup> Abhandlungen aus dem Gebiete der Rechtsgeschichte, i. p. 13 *et seq.*; Das englische Geschwornengerichte, i. p. 153 *et seq.*

<sup>4</sup> "Wohl aber finden wir es in dem Zeugniß der Nachbarschaft, die in Besitz und Eigenthumssachen zugezogen werden." Sachsenspiegel, ii. p. 621; *id.* in Berliner Jahrbücher Apr. 1830, p. 554 *et seq.* See Laband, Die vermögensrechtlichen Klagen, etc., p. 219 *et seq.*

<sup>5</sup> *Sup.*, p. 27.

<sup>6</sup> Reeves, History of the English Law, ed. Finlason, i. p. 137 *et seq.* Crabb, History of English Law, 29, 48. On the jury in Normandy, see Couppey, Tableau de l'Administration de la Justice criminelle en Normandie dans le cours du moyen-âge, et spécialement dans le temps de l'empire Anglo-Normande, in Mémoires de la Société Royale académique de Cherbourg, 1835; *id.*, Du Jury en Normandie dans le moyen-âge, etc., *id.* 1838; *id.*, De la preuve judiciaire au moyen-âge en Normandie, *id.* 1847; De la Morinière, Études historiques sur les Institutions, les Loix, et les Coutumes de la Normandie, Revue de Rouen et de la Normandie, 1838; Rathéry, Études historiques sur les Institutions judiciaires de la Normandie, 1839.

<sup>7</sup> Hicceus, Linguarum Vet. Septen. Thes. ii., De antiq. litt. Septen. utilitate, etc., Diss. Epis.

curs a description of the Scandinavian Nembda,<sup>1</sup> an institution supposed by Blackstone, as well as by Hickes and Reeves, to be the prototype of the jury.<sup>2</sup> Biener, in his principal work on the jury, records himself as favoring the derivation of every form of the institution from Normandy,<sup>3</sup> and in other connections, the Northern origin.<sup>4</sup> Konrad Maurer, perhaps the best living authority on Scandinavian and Icelandic institutions, found the common root of the jury among the Northern peoples in the community witnesses, which developed later in different races, and so in Normandy formed the pattern for the English jury.<sup>5</sup> The treatise of Repp<sup>6</sup> attempted to show the existence of the jury in the Northern countries, and its connection with the English institution. The author, however, mixes up the different kinds of primitive courts in those countries, and, from ignorance of the real nature of the English jury, falls into the same error, made, as we have already seen, by so many German writers, of finding a connection between the jury and the various bodies of lay judges, known in German law by the name of Schöffen, and variously designated in Iceland and Scandinavia.<sup>7</sup> Similarly fruitless was an attempt of Dahlmann<sup>8</sup> to trace the jury from a Norwegian popular court composed of twelve men. The general Germanic origin of the jury is implied in the treatise of Prof. Gneist.<sup>9</sup> The author distinguishes as necessary factors, that went to make the present institution, an old Germanic element, an Anglo-Saxon element, and a Norman element.<sup>10</sup>

<sup>1</sup> Saxonis Grammatici Historia Danica, ed. 1839, i. l. 9, p. 447.

<sup>2</sup> Bl. Com., iii. c. 23. Blackstone's authority was Stiernhook, De Iure Sueonum et Gothorum, l. i. c. 4.

<sup>3</sup> Das englische Geschwornengericht, i. p. 14.

<sup>4</sup> Abhandlungen aus dem Gebiete der Rechtsgeschichte, ii. p. 125 *et seq.*; id. in Zeitschrift für deutsches Recht, xi. 56.

<sup>5</sup> Beweisverfahren nach deutschem Rechte, in Kritische Ueberschau, v. 390, 180, *et seq.*

<sup>6</sup> A historical treatise on Tryal by Jury, &c., formerly in use in Scandinavia and Iceland, 1832.

<sup>7</sup> See De la Rue, Nouveaux Essais historiques sur la ville de Caen et son arrondissement: De l'Origine du Jury et son ancienne existence chez les Scandinaves et en Normandie; John, Dissertatio. In fontibus antiq. Iuris Dithmarici "Nemede" inventur, Qualis sit eius natura et qualis coherencia cum iuratorum iudicio Angliæ queritur, 1860.

<sup>8</sup> Wegweiser durch die Geschichte der englischen Jury, in Zeitschrift für deutsches Recht, x. 185 *et seq.*; id., Geschichte von Dänemark, ii. 195, 387.

<sup>9</sup> Bildung der Geschwornengerichte in Deutschland.

<sup>10</sup> See also Gneist, Geschichte des englischen Verwaltungsrechts, 178, 264; id.

While the majority of those who favor the theory of the introduction into England by way of Normandy have believed that the latter country received it from the Norsemen, one writer alone, v. Daniels, contended that the Normans owed it to Frankish institutions.<sup>1</sup> He found the germ of the jury in certain provisions of Charlemagne and Louis the Pious, in accordance with which the formal community witnesses could be summoned before the Court to be submitted to a preliminary examination. This process was called *inquisitio*. The book of v. Daniels is of interest, for although it missed the true solution, it came nearer the truth than any other of the many works on the subject previous to that of Brunner. The canon law has been accredited with the original employment of the jury process. Von Möhl considered it the result of a transfer of the method of accusation in use in the ecclesiastical courts (*Sendgerichte*) in the Frankish epoch into the forms used in the ordinary secular courts.<sup>2</sup> Meyer, in his well-known work on Judicial Institutions, could not find the origin of the jury in Europe, but traced it to Jerusalem and the procedure of the feudal courts established there by the crusaders, and of which we have an account in the *Assises de Jérusalem*.<sup>3</sup> After Meyer's book was published, another derivation of the jury was promulgated, which so attracted Meyer, that he retracted his own theory, and accepted the new one. Maciejowski, in his *History of Slavonic Law*, claimed the jury as original to the Slavonic race,<sup>4</sup> and the claim seemed to Meyer so well founded that he communicated

*Geschichte und heutige Gestalt der englischen Communalverfassung*, 2d ed., i. 96, 168; id. *Self-Government in England*, in one vol., 1871.

<sup>1</sup> Ursprung und Werth der Geschwornenanstalt, p. 4: "Der Ursprung des Geschwornengerichtes lässt sich mit vollkommener Sicherheit auf karolingisch-fränkische Anordnungen zurückführen, etc.

<sup>2</sup> Ueber das Geschwornengericht, p. 19: "Das Geschwornengericht beruht auf einer Uebertragung des bei den geistlichen Sendgerichten üblichen Verfahrens auf das bei den Schöffengerichten gebräuchliche Verfahren."

<sup>3</sup> Meyer, *Esprit, Origine, et Progrès des Institutions Judiciaires*, ii. p. 185, 188, et seq.: "On ne peut se défendre de supposer que la première idée d'attribuer au jury un pouvoir judiciaire n'ait passé des assises de Jérusalem dans la loi commune de l'Angleterre." This theory has not yet become so widely accepted as that other antiquated error, to the effect that the crusader Richard of England established the code of maritime law, known as the Laws of Oleron, on his way back from the Holy Land. See Aignan, *Histoire du Jury*.

<sup>4</sup> *Slavische Rechtsgeschichte* (translated into German by Buss and Nawrocki), ii. p. 83: "So mangeln dennoch die Beweise nicht dass die Geschwornengerichte national-slavisch waren;" and it "eben so entwickelt hat wie bei andern Völkern."

his acceptance of the new theory to its author in a letter written in Latin, and added an improvement of his own to it, in accordance with which the jury owed its preservation in England to the institution of the Frankpledge, which he assumed the Anglo-Saxons carried with them to England, after borrowing the germ of the jury from the Slaves.<sup>1</sup>

The fact that the jury is composed of men chosen from the community at large, and is not a body made up of persons learned in the law, has been a fruitful source of error, not only in the estimation of the function and utility of the institution, but also in the investigation of its history. The exclusive contemplation of its popular side, and ignorance of its real nature as a whole, have led not only to countless comparisons and analogies more or less inaccurate between the jury and the various other forms of procedure in which the people were admitted to a share in the proceedings, and which have existed at some period among almost every people, ancient and modern, but also to the confounding of the two institutions. It is not difficult to trace many of the theories given above to this source, and there exist other instances still more striking, generally put forth by Continental writers who have confined their attention to the criminal jury alone as it exists there in modern times. Ewers<sup>2</sup> describes a court of twelve men which he found defined in the 'oldest Russian law-book, and which corresponded almost exactly with those popular or community courts which existed in all the Northern countries. This, he declared, contained the principle of all juries, and he explained the fact that they decided both law and fact by saying that the division of law and fact is a characteristic of a mature state of jurisprudence, and could not be expected to exist in primitive times.<sup>3</sup> Zentner, with national thoroughness, went much farther. In tracing the history of the jury, he began with the Mosaic law, as containing the first germs of the system, and followed it from that time down to the present.<sup>4</sup> Pettin-

<sup>1</sup> See Brunner, *Schwurgerichte*, pp. 17-19.

<sup>2</sup> *Das älteste Recht der Russen*, p. 300.

<sup>3</sup> "Hier haben wir die Grundlage aller Jury, ein sehr altes, wahrscheinlich allen Völkern ursprünglich gemeinschaftliches Institut." *Id.*, p. 300.

<sup>4</sup> Zentner, *Das Geschwornengericht mit Öffentlichkeit und Mündlichkeit im Gerichtsverfahren, in besonderer Rücksicht auf den Strafprocess, geschichtlich, rechtlich, und politisch betrachtet*, 2d ed. 1848, p. 10. "In diesem Sinne [i. e., as folk-court] ist die Jury so alt als der soziale Verband, selbst sogleich so alt als das Recht und die Freiheit."

gall<sup>1</sup> traced the jury only as far back as the Athenian Dicasts. The Count v. Blankensee made a similar attempt to find the jury among the Greeks and Romans, and to trace it thence to modern times. He remarked that the jury is not peculiar to any one people, but that he found it more fully developed among those ancients where the principles of liberty and equality most prevailed.<sup>2</sup>

Phillimore's notion of the jury is equally vague and inaccurate, and in attempting to prove identical "in principle and essence" the Roman *iudices* and the English jurymen, he gives a false notion of both. He therefore naturally thinks it "hardly possible to conceive a stronger proof of that ignorance of the most ordinary topics connected with general jurisprudence which has been so long the characteristic of the most eminent lawyers in this country [England], than the notion so vehemently entertained, and so popularly received, that the jury is of peculiarly English origin."<sup>3</sup> It may, however, be said, that the habit of severe accuracy of thought which has made common lawyers the greatest in the world has always preserved them from accepting as "identical in principle and essence" institutions as loosely related as these two in question.

Delisle not only found a true jury in the *iudices* of the Roman law, but undertook to show that it had maintained itself uninterruptedly down to modern times, and that the modern jury was the strict continuation of the Roman institution.<sup>4</sup> A reviewer of the work of Meyer<sup>5</sup> and that of Rogge<sup>6</sup> also claims for the Roman law, if not the creation, at least a large share in the formation, of the modern jury. The other share is due to the Anglo-Saxon law, or to the old Germanic law generally.<sup>7</sup>

<sup>1</sup> An Inquiry into the Use and Practice of Juries among the Greeks and Romans, from whence the origin of the English jury may probably be deduced. 1769.

<sup>2</sup> Schwurgerichte, &c., ed. 1848, by Dr. Kletke, pref. p. 1.

<sup>3</sup> Phillimore, Introduction to Roman Law, p. 17. Finlason is at one with Phillimore: "The system of trial under the Roman law was the original of trial by jury, with which, in all essential respects, it was identical." Reeves's History of the Common Law, pref. p. xx.

<sup>4</sup> Lebastard Delisle, Précis de l'Administration de la Justice criminelle chez les Romains, 1841.

<sup>5</sup> Esprit, Origine, et Progrès des Institutions Judiciaires.

<sup>6</sup> Gerichtswesen der Germanen.

<sup>7</sup> Von Hornthal (!) in *Hermes*, i. 206, Leipzig, 1822. The Roman derivation is also favored according to Mittermaier, Deutsches Strafverfahren, i. p. 289, 4th ed., by Van der Does de Bye, Historia Iudicii Iuratorum, c. iii.; Wit., De Iudicio

The introduction of the jury into France, and thus upon the Continent, at the unfavorable period of the Revolution, when every thing took on a political aspect, and institutions, whether judicial or other, were generally regarded merely with reference to their capability of furnishing means of resistance against an oppressive government, led to a general diffusion of the one-sided idea of the jury as a purely popular or folk-court, and nearly all the literature on the subject is even yet tinctured by it.

Wrong and worthless results are obtained because the definition of the jury with which the investigations start is vague and inaccurate. Ambroise Buchère fixes as the theme of his investigation, in searching for the origin of the jury, the principle of the intervention of citizens in the decision of criminal matters.<sup>1</sup> But, in this sense, there is no such thing, strictly speaking, as *origines du jury*, for, as Buchère says, the principle is found among all the ancient peoples, the Greeks, the Romans, the Barbarians in the middle ages, in short, it is almost universal. Even Laferrière does not escape the general fault, though he is, perhaps, a little less general in his deductions. Nevertheless, he finds the "identity of principle" nearly everywhere;<sup>2</sup> and he even sees traces of a jury in the early period of that system of combined Roman and canonical procedure that prevailed in France until the Revolution.

It is still with the jury in this unduly extended sense that we have to do in the academic prize-essay of M. Laboulaye, on the *Criminal Law of the Romans*.<sup>3</sup> The jury did not originate in the German forest, as Montesquieu thought, and is not peculiar to the German races. It existed among the Romans, and earlier among the Greeks. In all these, its forms were analogous to

*Iuratum Angl.*, p. 4; Rivière, *Esquisse historique de la Lég. crim. des Romains*, p. 19; Spence, *Inq.*, p. 200.

<sup>1</sup> "Mais pour bien comprendre l'origine de cette institution, il faut, à notre avis, en étudier le véritable caractère, le principe fondamental, regardé par tous les publicistes comme une garantie de la liberté publique : l'intervention des citoyens dans le jugement des affaires criminelles." *Études historiques sur les origines du jury. Revue Historique de Droit français et étranger*, viii. 144, 146, *et seq.*, 1862.

<sup>2</sup> "L'identité de principe pour l'institution judiciaire existait, comme on vient le voir dans les coutumes Scandinaves, les coutumes Anglo-Saxonnes, le jury d'Angleterre, la jurée de Normandie, etc." *Hist. du Droit français*, v. l. xii., c. iv., § iii., p. 621.

<sup>3</sup> *Essai sur les Loix criminelles des Romains concernant la Responsabilité des Magistrats*, p. 331 *et seq.*

those of the French jury and the English jury.<sup>1</sup> How little this conception of the jury had to do with the strict historical derivation of the institution is shown by the fact that M. Laboulaye goes on in the same connection to say that these judicial forms will always reappear whenever a people, master of itself and of its government, perceives that its political liberties can be preserved only so far as "citizens without public functions" are alone called to pronounce on the honor and the life of their fellow-citizens.<sup>2</sup> This idea is not peculiar to M. Laboulaye. It has other famous supporters. In presenting to the notice of the French Academy the works of Couppey<sup>3</sup> and of Lebastard Delisle,<sup>4</sup> in 1842, Alexis de Tocqueville gave utterance to an almost identical theory to explain the origin of the institution. The jury existed, no doubt, in Normandy, as M. Couppey contended, but it did not have its sole origin there. It existed also in Rome. But it is not necessary, with M. Delisle, to trace its continued unbroken existence in the remains of the Roman law down to modern times, because the jury is one of those institutions which come into existence, as it were, inevitably, whenever a people reach a certain stage of political and social development.<sup>5</sup>

Köstlin began one of his articles on the jury with the wholesome declaration, that nothing is more superficial or more misleading than the attempt to derive the jury from any of the old Germanic popular courts, or, indeed, from the popular courts of

<sup>1</sup> The analogy between the Roman *iudices* and jurymen is one which has been often drawn. But what may well be called analogous is not necessarily identical; and, above all, a historical connection in such case is not by any means necessarily to be accepted. Austin points out that the *iudex*, appointed, as it seems, for the occasion, "is rather to be regarded as a jurymen taken *pro re nata* from the citizens at large than as a permanent judicial officer." He points out the differences, however, between the two functionaries, and does not allow himself, except in this guarded way, to call the Roman *iudex*, or assessor, a jurymen. Lectures on Jurisprudence, ii. 606, 4th ed.

<sup>2</sup> *Id.*, p. 387 et seq.

<sup>3</sup> Tableau de l'Administration de la Justice criminelle en Normandie dans le cours du moyen-âge, et spécialement dans le temps de l'empire Anglo-Normand, *sup.*

<sup>4</sup> Précis de l'Administration de la Justice criminelle chez les Romains. Paris, 1841, *supra*.

<sup>5</sup> "Aussi, pour ma part ne lui assignerai-je ni l'une ni l'autre de ces sources : suivant moi le jury est une de ces institutions qui naissent spontanément dans un certain état social et politique. Arrivé à ce point chaque peuple le trouve de lui-même, il n'a pas besoin, pour le créer, d'imiter ses prédécesseurs ou ses voisins." Travaux de l'Acad. des Sciences Morales et Politiques, x. 56; Revue historique de Droit français et étranger, xvi. 298, 308, 309.



the ancient world.<sup>1</sup> This, however, did not prevent him, thirty pages farther on, from making the essentially misleading statement, that the jury "was an instinctive creation of the spirit of the people."<sup>2</sup> The fact is exactly the contrary. The prototype of the jury was an innovation of the royal prerogative under the Frankish kings, and existed for centuries by virtue solely of the arbitrary will of the sovereign. It stood during all this time in antagonism to the *Volkegeist*, as manifested in the archaic formal procedure of the popular courts. It marked, not an assertion of the right of the people to a share in pronouncing judgment, but the birth of a strong public power able to ignore the cumbersome methods of procedure of the customary or people's courts, in the interest of a rational mode of judicial investigation, a method of proof merely, in our sense of the word. Moreover, it was exclusively in civil matters that the jury was employed during the first centuries of its existence. A jury of accusation was, to be sure, known in Frankish times; but even that was of later date than the civil jury of proof, while the criminal jury of proof did not exist then, and is many hundred years younger than the civil jury. The investigations of Brunner have established that the proceeding corresponding to the Norman *recognitio* and the English *assisa*, out of which the jury grew, is not derived from the North, but from a mode of proof established in Karolingian times in the Frankish empire. This procedure is not the ordinary formal procedure by witnesses practised in the customary or folk courts, to which, as v. Daniels<sup>3</sup> supposed, Charlemagne and Louis the Pious attached certain new regulations out of which the jury grew; but an extraordinary procedure, owing its creation to the royal will, and subsisting entirely by it. To understand this procedure, and its relation to that of the ordinary folk-courts, it will be necessary to summarize the results lately obtained by German scholars, notably by Rudolph Sohm, from a re-examination of the judicial monuments of the Frankish period.<sup>4</sup> The fruitful idea resulting from these investigations is, that the great changes in the archaic German

<sup>1</sup> Zeitschrift für deutsches Recht, xii. 406.

<sup>2</sup> "Die ganze Entwicklung [i.e. from compurgators into jurors] . . . war eine instinctmässige Bildung des Volksgeistes." Id., p. 435.

<sup>3</sup> Ursprung und Werth der Geschwornenanstalt, *supra*.

<sup>4</sup> Sohm, Altdeutsche Reichs- und Gerichtsverfassung, i.

law, or, more exactly, the great innovations set up by the side of that law by the immediate exercise of the royal power in the Karolingian monarchy, render a division of the law of this period into *ius commune* or *ius strictum*, on the one hand, and *ius officiale*, *ius honorarium*, or *ius æquum*, on the other, not only convenient, but necessary, for a correct understanding of it. The German law in the time of the Frankish monarchy acquired, according to this theory, the same dual character that distinguished the Roman law. The *ius commune* was the customary or folk law, not owing its existence to the immediate intervention of the sovereign, as the Roman *ius civile* was the law of the Roman legal development. The Frankish *ius officiale* was the immediate creation of the royal will, and consisted of rules for the exercise of the supreme power. The Frankish capitularies exercised the same function in German law as the prætorian edicts in Roman law.<sup>1</sup>

The royal regulations or capitularies did not change the common law, and could not. They simply built up a system which subsisted independently of and by the side of the common or folk law. These regulations affected chiefly the law of procedure, for in primitive communities substantive law is always subordinate to adjective law, the law of process. That is, the form dominates the substance. It is an exploded notion, that, in primitive times, the forms of law are simple. The exact opposite is the case. The most ponderous and inexorable formalism reigns in primitive procedure.<sup>2</sup> The primitive Roman *legis actiones* were a marvel of rigid forms,<sup>3</sup> and the same feature characterized the archaic barbarian procedure. The court consisted of a president, usually the *Graf*, and the members of the community whose duty it was to sit in judgment, — the *Rachimburgi*, *Scabini*, *Schöffen*. The function of the president was to see that the proceedings had before the court were carried on in accordance with the forms required by the law. Those who sat with him, the *Rachimburgi*, rendered the judgment. At every stage of the process the court was passive. Both in civil and criminal cases,

<sup>1</sup> Sohm, id. p. 544.

<sup>2</sup> Sohm, *Der Process der Lex Salica*; id., *Altdeutsche Reichs- und Gerichtsverfassung*, i.; Brunner, *Wort und Form in altfranzösischem Process*, *Sitzungsberichte der Wiener Akademie*, Philos.-Hist. Klasse, vol. lvii. p. 655 *et seq.* (1868); Siegel, *Die Erholung und Wandelung im gerichtlichen Verfahren*, id. vol. xlii. p. 201 *et seq.* (1863); id., *Die Gefahr vor Gericht und im Rechtsgang*, id. vol. li. p. 120 *et seq.* (1866).

<sup>3</sup> Bethmann-Hollweg, *Der Civilprozess des gemeinen Rechts*, i. p. 38, 48, *et seq.*

the defendant or accused was summoned before the court by the plaintiff or accuser. Before the court the parties addressed each other directly, not the court. The complaint was recited by the plaintiff, and the defendant answered him, all in accordance with rigid forms. The defendant could only answer in the exact words of the complaint, and could only admit or deny it. No demurrer, plea, or explanation, was allowed. The complaint and answer constituted the whole proceedings on which the judgment was based, and the latter followed immediately on the formal prayer of the complainant therefor. The proceedings of proof followed the judgment. The latter fixed the exact point to be established by the proof, and the mode thereof, and also ordained what should be the final *status* of the question in dispute, according to the issue of the proceedings of proof. The Rachimburgi gave their decision at their peril. In place of appealing, the party dissatisfied could only challenge the judgment, in which case the judges were obliged to defend by personal combat the legal correctness of it. This action was carried on between the dissatisfied party and the members of the court. The other original party had no concern in it. The proceedings of proof took place in accordance with the judgment ordering it. In the proceedings of proof, as in the preceding steps of the process, the court counted for but little. The object was not in the least to convince the mind and conscience of the court. Of that there was no need, inasmuch as the judgment had already been pronounced on the assertions of the parties. The object was to give that satisfaction to the other party, which, in accordance with the rigor of forms, he had a right to demand. The function of the court was still to see that these forms were complied with. The methods of proof were, the oath of the party (either alone or supported by compurgators), the ordeal, and the judicial combat, the latter chiefly in subsidiary proceedings on the challenge of the judgment or the oath of the compurgators.

The employment of witnesses (*Zeugen*) was extremely limited. It was not sufficient that a person was cognizant of the whole matter in dispute to qualify him for a witness. To be competent, he must have been called at the time of the act complained of in the suit, with the purpose of making him a witness afterwards. There were also the community or neighborhood witnesses, whose employment was, however, very limited. It is necessary not to

be misled by the name into supposing that these witnesses corresponded in character to witnesses in our sense of the word. The function of the neighborhood witness was the same as that of the oath and the ordeal. He did not give evidence before the court. The point to be established by the proof having been fixed beforehand, the so-called witness had only to support or to deny this point. That was his whole duty. Like the compurgator, he was called by the party in whose favor he was to appear, and, like the former, his function was exhausted when he had confirmed on oath the assertion or denial, as the case might be, of his principal. In certain instances the opposite party could challenge the witness, as he could the compurgator, to maintain his assertion by combat. Every step of the process thus described had its peril of a violation of the rigid technicalities attending it. As in every other stage of the proceedings, so in the proceedings of proof by any of the methods above given, the minutest departure from the prescribed form not only had as result the total loss of the action, but the offending party was subjected to a heavy fine, and prohibited from bringing another action.

Out of this archaic form of procedure the jury has not grown. Neither the *Rachimburgi*, the popular members of the court, on the one hand, nor any of the modes of proof, the ordeal, the compurgators, or the formal witnesses, on the other, can be looked upon as the germ out of which it sprang.

The innovations introduced by the Frankish kings, so far as procedure was concerned, all had the tendency to simplify it. They furnish an instance of that method of legal change, by way of equity, which Sir Henry Maine has made familiar to English readers.<sup>1</sup>

The Frankish kings had frequent occasion to institute legal proceedings on their own account. The private property of the sovereign was not separated from that which he held by official title, and controversies frequently arose in different parts of the empire affecting the royal possessions. The formal process of the ordinary courts did not always suffice to secure the rights of the king. The common law could only furnish a remedy for those cases contemplated when its unbending rules were formed. It was natural, therefore, that the king should

<sup>1</sup> Maine, *Ancient Law*, 4th ed., 25 *et seq.*

take the remedy into his own hands. The practice grew up of having all cases involving the interests of the royal property brought in the court of the king, either in that presided over by himself, or his representative the *Pfalzgraf*, or in those held under royal commission by the *missi*. As opposed to the formal folk-courts, the royal court acquired the character of a court of equity, that is, the king, by virtue of his royal prerogative of extraordinary judicial power, dispensed with the formalism of the law of the land, and proceeded in such a way as should most directly secure the end in view, a rational settlement of the dispute.

The change from the old procedure that especially concerns us is the institution of a method of proof entirely unknown to the old formal process, and which appears in the capitularies and records of the period, as *inquisitio per testes*, or proof by interrogation of witnesses. According to this new method, the royal judge was authorized to summon those persons of the neighborhood or community, who, he had reason to presume, had best knowledge of the matter to be inquired into, and take their sworn testimony thereupon. On this testimony the judgment was formed. That is, this extraordinary process instituted by the arbitrary exercise of the royal prerogative, and which ignored the archaic forms prescribed by the folk-courts, is the first step in the barbarian procedure towards a rational system of judicial proof in our sense of the term. It is also the germ from which, in strict historical continuity, our jury has grown. The differences between it and the community witnesses of the old formal procedure are these: In the archaic procedure, the judgment of the *Rachimburgi* was rendered before the proceedings of proof, on the assertions of the parties alone, and it fixed the point to be established by the proceedings of proof. The witnesses were called by the party, and spoke only in his behalf, and merely affirmed the assertion or denial of their principal as to the single point fixed by the judgment to be proved. Their oath consisted of an assertion that the point they had supported was true, and was generally made after they had given their evidence. They came voluntarily, as the party had no power to compel them to appear. They were obliged to support their assertion by combat, if challenged by the opposite party. In the proceedings with the witnesses, as in every other stage of the case, there were iron rules to be observed, the minutest

violation of any one of which had as result the final loss of the case, and the punishment of the tripping party. The witnesses in the royal procedure, on the other hand, gave their testimony before the judgment was pronounced, and as with us at the present time, the object of their testimony was to furnish a rational basis for the formation of the judgment. They were called by the judge, and their function was to tell all they knew about the matter in question. Hence they might speak for the one party or for the other, according to their knowledge. They were sworn to speak the whole truth, and their oath was generally made before their evidence was given.<sup>1</sup>

The employment of this mode of proof was not confined to the fiscal affairs of the king, but was extended by favor to his beneficiaries, the religious establishments under his immediate protection, the affairs of widows and orphans in his guardianship, and especially to the church in general. The proceeding always retained the character of royal prerogative, and was authorized and introduced by a royal mandate. This mandate was called *indculus regalis* or *breve inquisitionis*, and is the forerunner of our present writ process. Sometimes the order was for the royal *missus* to inquire into the matter mentioned in the royal order, and to transmit the result to the king for his decision; sometimes both to make inquisition and to decide the case. These two cases were called *auctoritas inquirendi* and *auctoritas definiendi*. Sometimes a general order was issued to investigate all matters coming within the jurisdiction of the royal *missus* by this method. Sometimes a party who had received the special privilege of this kind of proof evoked a royal order which suspended the proceedings already begun against him in the common-law court. The royal judge then entered in place of the regular judge, and the matter was inquired of in the new manner. Only in exceptional cases were the ordinary judges, the count, the viscount, the centurion, authorized to proceed by this method, without special royal authority. They were, of course, confined to the archaic formal modes of proof in vogue in the popular courts.

The number of the witnesses in the *inquisitio per testes* varied greatly. In the old formal process, twelve seems to have been

<sup>1</sup> Sometimes they testified on the general oath of fidelity which they had made to the king, instead of taking a special oath.

a favorite judicial number, but from the rational nature of the new procedure, the number could have no arbitrary limit. Instances occur of as few as five, and, on the other hand, the number rose sometimes as high as two hundred. The qualifications of the *testes* were substantially those required of the community witnesses. They were to be the most reliable men of the neighborhood. Unlike the community witnesses, they were obliged to appear when summoned. To serve as *iurator* was a general obligation towards the king himself. All the proceedings in the new process were had before the court. As with us, the object of the proof in the new process was to convince the court, not merely to render a formal satisfaction to the opposite party as in the archaic process, the process of the regular courts. The conclusion of the witnesses was sometimes given individually, sometimes by one voice (*mit gesamtem Munde*). Generally, however, at this period, they did not form a unity, but stood in relation to the court as individuals. Their appellation *iuratores*, which occurs for the first time in a work on ecclesiastical procedure under date of 906,<sup>1</sup> may indicate their individual character. The number of concurring voices requisite for a decision was not always the same. Unanimity was not always required, nor yet was a simple majority always sufficient. There was no rule yet developed, and the court regulated the matter. Corresponding with the general equitable character of the new process, there was, in place of the challenge of the judgment in the formal process, a provision for appeal, a *reclamatio ad regis definitivam sententiam*. In this process before the king, the contest was still between the original parties, not between the dissatisfied party and the *Rachimburgi* as in the archaic courts.<sup>2</sup>

On the breaking-up of the Frankish empire in the tenth century, Frankish institutions were preserved in some parts of France, but especially in Normandy.<sup>3</sup> The mode of proof pe-

<sup>1</sup> Reginonis Abbatis Prumensis lib. duo de synod. causis et discip. eccl.

<sup>2</sup> See Sohm, *Altdeutsche Reichs- und Gerichtsverfassung*, i.; Brunner, *Zeugen- und Inquisitionsbeweis der karolingischen Zeit*. *Sitzungsberichte der Wiener Akademie*, Philos.-Hist. Klasse, vol. li. (1866).

<sup>3</sup> For a general continuance of Frankish institutions in Normandy after A.D. 912, Brunner refers to Palgrave, *History of Normandy*; Stapleton, *Observations on the Great Rolls of the Norman Exchequer*; Lappenberg, *Geschichte von England*, ii. 22. See however, Konrad Maurer, in *Kritische Vierteljahrsschrift*, xii. 810.

culiar to the Frankish royal court, the *inquisitio per testes*, appears again in Normandy in unmistakable form. There, as during the Frankish empire, it forms one of the features of the sharp distinction still existing between royal (now ducal) law and common law, between the *ius æquum* of the sovereign and the *ius strictum* of the folk-courts. The ordinary process in Normandy was distinguished by the same rigor of form as the Frankish, and by far greater  *finesse*. In the whole of France, at this period, judicial process was shackled with an iron formalism.<sup>1</sup> The Norman process, however, excelled the French in technicality, and the Normans were celebrated throughout France as incorrigible hair-splitters (*unverbesserliche Silberstecher*). As in Frankish procedure, every step had to be taken with the most painful formality, and the minutest error was in the rule incurable, and entailed a fine as well as the loss of the suit. In formal Norman procedure, the modes of proof were the oath and the duel. In the ordinary process, the *inquisitio per testes* did not appear. Until the time of Henry II., it was employed by the Norman dukes as an extraordinary proceeding, and one resting solely on ducal prerogative. After the manner of the Frankish institution, it was employed in proceedings affecting the ducal possessions and treasury, both as a judicial and an administrative means. The privilege of its employment was accorded to favored religious establishments, and, to individuals who would pay roundly for the favor, the special *breve inquisitionis* was issued. At the time of the Norman conquest this institution was introduced into England, and employed very largely in the administrative and judicial system applied to the government of that country. The Domesday survey, a purely administrative measure, was taken by means of a great *inquisitio* ordered by William the Conqueror.

Between 912 and 1066, owing to the meagreness of the records of that period, the history of the institution is traced with great difficulty. The scanty documents have, however, yielded richly under the author's treatment, and the result is a series of correspondences between the Frankish institution and the Norman that allows no rational doubt of their identity. In confirmation of the internal evidence, and as final proof that the Norman jury is not due to the Northern settlers, the Frankish institution is traced

<sup>1</sup> See Brunner, *Wort und Form in altfranzösischem Process.*, *sup.*



and found in undeniable form in those parts of France formerly making part of the Frankish empire, but with which the Scandinavians never came in contact.

The character of the institution, as seen in Normandy, while essentially the same as in Frankish times, shows, nevertheless, certain changes characteristic of a maturer stage. As a rule, the individual character of the *iuratores* no longer appears, but they are looked upon by the court as a unity, a corporate body. The verdict is given generally by one of their number, after they have retired and consulted together as to what the verdict should be. Corresponding with this change in the practice appears the change in the appellation of the *iuratores*. For the *iuratores*, considered as a distinct body, the name *iurata*, *iurea*, *jurée*, comes into use, a name, by the way, of Romano-Frankish origin.

From the accession of Henry II., Duke of Normandy, and later, King of England, great changes were introduced into the forms by inquisition through the legislation or edicts of that ruler establishing the *recognitio*. From that time the three principal forms of the *inquisitio* were the *inquisitio ex brevi*, called in Normandy *recognitio*, and in England *assisa*; the *inquisitio ex iure*, the English *iurata*; and the *inquisitio ex officio*, the later English inquest of office. Through the *inquisitio ex brevi*, or *recognitio*, Henry II. provided that every party (though not in all kinds of cases) might avail himself of the new rational mode of proof, and should no longer be confined to the formal barbarian methods theretofore in vogue. That is, at this point the new method of proof ceases to be an extraordinary one, a mere emanation of the royal or ducal prerogative, by virtue of which the sovereign chose to ignore the law of the land in his own affairs and those of persons privileged by him. So long as such continued to be the character of the new procedure, no amelioration of the ordinary process was probable. Now, however, the antiquated, barbarous system came in direct contact and competition with the new rational one, and began gradually to be displaced by it.

The number of jurors summoned was not fixed invariably at twelve, though, at this time, that was the prevailing number. The number requisite for a valid verdict varied in the two countries, according to the nature of the action. In possessory

actions, *brevia de possessione*, a majority of twelve sufficed, and, in consequence, if seven only were summoned, and they were unanimous, the verdict was good. In petitory actions, *brevia de recto* for the full property in land, the agreement of twelve was required in England, of eleven in Normandy.<sup>1</sup>

The question as to the respective claims of England and Normandy to the honor of having been the birthplace of the jury considered not as a special royal favor, but as a part of the law of the land, depends upon that of the *inquisitio ex brevi*, instituted by Henry II. According to Brunner, there are proofs of its existence in Normandy at least two years before it could have been introduced into England (assuming that it is a creation of Henry II.); that is, two years before this Norman duke became King of England, in 1154. The new documents adduced by Brunner, for the first time in the history of the controversy, give an account of two *recognitions* ordered by Henry II. for the bishopric of Baieux between the years 1150–1152.<sup>2</sup> For the priority of the Norman *recognitio* over the corresponding English *assisa*, it seems conclusive.<sup>3</sup> When we come to consider the second form of the method of proof by inquisition, as found in Normandy, the *inquisitio ex iure*, the question acquires new features. The *inquisitio ex iure* had its counterpart in the English *iurata*. Neither owed its existence to a decree of the sovereign. The *iurata*, according to Brunner, “appears to have been a method of proof by *inquisitio*, which introduced itself into the archaic formal process by way of custom.” The manner of this process does not clearly appear, but is probably as follows: Both in Normandy and England the parties were at liberty to agree to have a jury, and thus exclude the formal process. In Normandy, a case on this condition could be submitted to a jury in the feudal court, the court of the seigneur, in England, only in the king’s court. The *recognitio* was not applicable to all cases at first, and the *iurata* was employed by agreement of the parties in those cases where

<sup>1</sup> See Gundermann, Ueber die Einstimmigkeit der Geschwornen, as to “unanimity of eleven” out of twelve.

<sup>2</sup> Cartulaire de Baieux, Liber niger capitali ecclesiæ Baiocensis, Bibliothèque du Chapitre de Baieux (unprinted).

<sup>3</sup> See Stubbs, Constitutional History of England, i. p. 609, 674, *et seq.*, for the latest presentation of the whole subject. His theory is “mainly that of Palgrave, but corrected and adjusted by the recent writings of Dr. Brunner,” *id.* 612, n. 1; Taswell-Langmead, Eng. Con. Hist., 154 *et seq.*

otherwise resort must have been had to the old formal witnesses (*Gemeindegzeugniss*). In course of time, the consent of the parties became a fiction, although for a long time the *iurata* preserved the character of a voluntary arbitration. In Normandy the *iurata* acquired the character of the *recognitio*, except that it did not require a *breve*. Under the *iurata* the juror swore to speak the truth about that which the *iusticiarii* should ask; under the *recognitio*, the question to be proved was set out beforehand in the *breve* summoning the *iuratores*. In England the *iurata* was summoned by a royal writ, but sworn *in modum iuratae*; i.e., to answer whatever the justices asked. As being less formal in its character than the *recognitio*, the *iurata* was well calculated to answer incidental questions arising in the course of a trial. Hence, perhaps, the frequent occurrence of the phrase in the old books, *assisa vertitur in iuratum*. The grand assize was instituted to supplant the duel, and could only be employed in cases where formerly the duel was allowed. Hence, in all other petitory actions, *brevia de recto*, not admitting the duel, as well as in many new actions for which no forms existed, the *iurata* was applicable. Since, in this mode of inquiry, the question to be proved could be put directly to the jurors by the justice, and need not be set forth beforehand in the writ, as was necessary with the assize, the latter finally virtually gave way to the former, in that it gave its verdict *in modum iuratae*.

During the Norman and Anglo-Norman period of the jury, it appears exclusively as a means of proof. The jurors were witnesses. In England, if the required number could not agree on a verdict, those who disagreed from the majority, or who said they knew nothing about the matter, were supplanted by others by a process called *affortiatio*, until the required number was obtained to render a verdict. About the beginning of the fourteenth century, this practice was superseded by the requirement of unanimity on the part of the original twelve as a more convenient and expeditious process.

The process by which the jury of proof was gradually transformed into the modern jury of judgment has been well described by Starkie<sup>1</sup> and Forsyth, and Brunner's theory does not vary much from that previously held. It is the period when *evi-*

<sup>1</sup> On the Trial by Jury. *Law Review and Quarterly Journal of British and Foreign Jurisprudence*, ii. 370.

dence, in our sense of the word, began to be taken before the court. The change began by special witnesses being called in certain contingencies, in case, for example, of a disputed record, to give the jurors, that is, the community, or official witnesses, the benefit of their information. At first, the special witness retired to consult with the jurors, but without having any voice in the final determination. Finally, when is not exactly known, the special witness was interrogated before the court in presence of the jurors. This stage of the jury is described in Fortescue, *De Laudibus Legum Angliæ*, written in 1460. In a description of a jury-trial in the book *De Republica Anglorum*, by Thomas Smith, written in 1565, the jurors are sworn, *ad facti veritatem dicendam secundum probationes in iudicium deductas et conscientiam suam*.<sup>1</sup> In 1650, in accordance, no doubt, with what had obtained for a long time, the King's Bench declared the function of jurymen and that of special witness incompatible.

If we turn to the criminal jury, which heretofore has had the lion's share of attention from Continental jurists, we find it only treated cursorily in this work. The reason is, that the account of the origin of the civil jury, which is older than the criminal jury, serves to illustrate both.

The jury of accusation was not an institution of the Anglo-Saxons, as has been thought. It is derived also from a Frankish mode of procedure. It was the outgrowth of the increased public power under the Frankish kings. In the old German process, all criminal complaints had to be made by the party injured, and in accordance with the archaic formal system. Under the Frankish royal system, the criminal caught in the act was punished without private complaint. For other cases, the royal judge called together the best men of the community, and required them on oath to report the offences that had taken place. The man thus accused was obliged to defend himself, either by compurgators or by the ordeal. It was long thought that this process was

<sup>1</sup> Brunner, in v. Holtzendorff's *Rechtslexikon*, ii. p. 559. Very interesting in this connection is the account of the decline of the Norman *enquête*, or *inquesta*, in France, while the corresponding English institution was steadily acquiring importance. At the time when the English jury was taking on its final character of a jury of judgment, the Norman *jurée*, already become obsolete, was finally abolished in the official revision of the customs in 1583. In England the judicial functions were thenceforth divided between the judge and the jury. In France they were all concentrated in the hands of the judge.

borrowed from a similar practice prevailing in the Church, by which the bishop made inquiry into offences, and which is described by the Abbot Regino.<sup>1</sup> Dove, however, showed that the converse was true, the ecclesiastical process was derived from the secular.<sup>2</sup> The process appears in the middle ages, after the breaking-up of the Frankish monarchy, in Flanders, in the French *coutumes*, in Germany. It was applied in England by the Normans in connection with the system of Frankpledge. The complaint was made by at least twelve men of the hundred, and called *indictement*, or *presentement*. In the fourteenth century it was supplanted by the grand inquest, consisting at first of twenty-four men out of the entire county. Out of this the grand jury of twenty-three men has grown.

A criminal jury of proof is comparatively modern. It was unknown in Frankish times, and in Normandy and England until the time of King John. The *iurata* was sometimes, however, on the election of the accused, employed to settle intermediate questions in the main trial in the twelfth century. The usual modes of proof in criminal cases were the ordeal and the judicial combat. Magna Charta gave the accused the right to a trial by the *iurata*, to "put himself upon the country," in all cases. The abolition of the ordeal by the Church in 1219 left the *iurata* the ordinary means of trial in criminal cases, but the principle common to England and Normandy, that a man could not be compelled to submit to this mode of decision, but could resort, if he so elected, to the primitive mode of defence and vindication by his body, that is, by judicial combat, remained English law till 1819.

I. T. HOAGUE.

<sup>1</sup> *Supra*, p. 44.

<sup>2</sup> Die fränkischen Sendgerichte, Zeitschrift für deutsches Recht, xix. 321 et seq.

RESPONSIBILITY IN MENTAL DISEASE.<sup>1</sup>

THE question of responsibility in disease is perhaps the most intricate one that arises in the law. Other questions may necessitate the sifting of conflicting authorities, the balancing of opposing equities, subtle distinctions, and weighty considerations. Much more than all this is involved in deciding how far a man can be held accountable for his acts. The difficulty of this investigation has always been admitted; but it is now evident, that, apart from any legal questions, the law in this matter will have to deal with the most important and the most obscure problems in science,—the relation and interplay of mind and body, and how far mental action is controlled by or is the result of physical properties and its own antecedents.

Dr. Maudsley's work might be supposed to be written for a medical or scientific audience, and to be hardly a fit subject for review in a legal magazine. But the book is evidently intended for legal readers; and, on the subject to which he has given such thorough study, his views might, perhaps, be considered as valuable authority, even before a legal tribunal, as the obsolete *dicta* of some ancient judge who drew his science from Hippocrates, and his metaphysics from the schoolmen.

Reading this book suggests two questions of great importance: first, what is the nature of mental disease, and how far does it affect action? and second, having a correct knowledge of the facts, how far will that alter the principle on which the law should be enforced?

Dr. Maudsley's views are extreme as to the extent that any action may be modified, or rather controlled, by the mental unsoundness of the actor; and he claims that the rules of law that are ordinarily laid down as to insanity show a great disregard of the facts of morbid psychology.

In this we think he is right. He discusses the various degrees and phases of insanity with great familiarity with the subject from practical observation, and from a thoroughly scientific

<sup>1</sup> *Responsibility in Mental Disease*, by Henry Maudsley, M.D. Appleton & Co.

standpoint. He then draws his corollary as to what should be the treatment of those whose actions are controlled by their morbid mental condition. We are by no means sure that his conclusion is supported by his premises.

The attitudes of the law toward insanity, and its many *dicta* as to what constituted it, and how far it affected or excused action or crime, have been only equalled in their variety by their unvarying incorrectness. From the days when only the "wild beast" in human form was supposed to be devoid of correct moral principles, and free from rigid moral accountability, down through the man who was in delirium, the man who was under delusion, and the man who did not know the difference between right and wrong, to him who was under some sudden irresistible impulse, the learned judges who have discussed such themes, and who have successively chosen each of the above standards by which to test insanity, have been almost equally unsuccessful in their efforts to grasp accurately the nature of morbid and unsound mental action, and its influence upon character. The old *dicta* as to what constituted insanity have been abandoned; but new ones are at once adopted, not very much more correct.

The time is rapidly coming, if it is not already reached, when all mental disorder will be acknowledged to be the result, or at least the accompaniment, of a diseased condition of the bodily functions, through which mental action is produced. In other words, insanity is as much a disease as dyspepsia, or any other of the ills to which flesh is heir. This diseased physical condition may be the result of various causes, — unwholesome psychological as well as physiological antecedents or influences. But, whatever the cause, a certain distortion of the normal mental faculties is produced. Admitting that when criminal action results from a diseased mind, from insanity so styled, the perpetrator is relieved from responsibility or punishment, then the only question is, whether the action is the result of the abnormal mental condition.

For courts to say what is the degree of disorder which will relieve from responsibility, or rather what are the *indicia* which, and which alone, establish the fact of such disorder, is contrary to any correct principles of law or psychology.

The symptoms and varieties of mental disorder are as infinite

in number as are the capacities of the brain. But of all these the courts have most frequently chosen the power to judge as to the rightness or wrongness of action in general, or of the particular action of which complaint is made, as the one thing which severed the sane from the insane, the responsible from the irresponsible. This rule has the authority of the judges of England, in their very solemn although somewhat confused statement of the law of insanity, in answer to the questions of the House of Lords. It has, as we shall see, been lately re-enunciated by the highest court of the State of New York, and would still probably be considered the test of responsibility in the majority of English and American courts.

To choose from all the symptoms of insanity this one arbitrary test is as if the judge should charge the jury that a pulse at one hundred was the one symptom and proof of fever; and it is very much more illogical. Whether a pulse beats at one hundred is a thing that can be ascertained; but whether a person rightly comprehends the distinction between right and wrong is what no twelve men can ever surely say, though the jury were composed of Platos, Kants, and Luthers. The test of knowledge of the distinction between right and wrong is unfair to the alleged criminal, and false in principle.

An insane man may know what other men think is right or wrong; but what is the law unto himself which his diseased mind has framed? There may be delusions in morals as well as in material objects. Innumerable and very diverse are the things which at different times and places sane men do, and believe that they do God service. Who, however sane, can presume to fix the bounds between right and wrong, that seem so different, not only to every age, but to almost every man? It may be said, perhaps, that the statute law prohibits certain acts, and thus furnishes a certain standard, independent of the theories of philosophers or the vagaries of enthusiasts; but the statute does not profess to establish with any certainty what conduct will come within its prohibitions, and be subject to its penalties. That the supposed knowledge of the distinction between right and wrong should have been so often submitted as the test on which depended legal rights or responsibilities shows how a faulty system of metaphysics has affected our law as well as our philosophy.



It would be impossible to submit to a jury a more profound and baffling problem than to determine both the doubtful boundaries of right and wrong, and the correctness of another's apprehension of them.

This time-honored error is beginning to be attacked, though it still finds frequent judicial approval. In a recent case in New York, — *Vanlandt v. Mutual Benefit Ins. Co.*, — in an action on a policy of life insurance, which the company claimed had been avoided by the death of the assured by his own hand, the judge at the circuit charged that it was for the jury to say whether or not the assured, at the time he committed suicide, knew the distinction between right and wrong ; whether he knew the moral nature of the act he was committing ; and if he did not, then he was not responsible for his actions, and the company was liable. Here it was laid down that the test, even of civil rights, is, whether a man agrees in the opinion ordinarily held in this country as to the criminality of an act which has the approval of the purest and most elevated thinkers of antiquity ; which is believed commendable by vast numbers of men ; which is, in the opinion of very many thinking men, only a cowardly thing at most ; and which is only considered criminal from certain corollaries assumed to be derived from the religion which is generally accepted at this time. Suicide may be a crime ; but to say, that, in so debated a question, a man's adopting views differing from those of the majority of the community in which he lives should affect civil rights, and, under some circumstances, might modify criminal responsibility, seems to us a very unsafe rule.

The judgment was reversed in the Court of Appeals ; and Mr. Justice Rapallo, writing the opinion, and holding that the proper question was, whether the insured knew the physical consequences of his act, very pertinently remarks, —

“In the practical administration of justice in cases of this description, it seems to us a very dangerous doctrine to hold that the attention of the jury should be directed principally to the degree of apprehension which the deceased had of the moral nature of his act, and that this question, most speculative, and difficult of solution, should be made the test by which it should be determined whether he had knowingly and voluntarily violated the condition of his insurance. The real question is, whether he did the act consciously and voluntarily, or whether, from disease, his mind had ceased to control his action.”

Yet, while repudiating such a test in a civil action, this same court, in the late case of *Flanagan v. The People*,<sup>1</sup> on an indictment for murder, laid down the prisoner's knowledge of right and wrong as the question for the jury in determining his responsibility.

Not only does it adhere to ancient error, but very distinctly repudiates what are now most thoroughly established facts in the psychology of insanity.

Andrews, J., delivering the opinion, says, —

“We are asked in this case to introduce a new element into the rule of criminal responsibility in cases of alleged insanity, and to hold that the power of choosing right from wrong is as essential to legal responsibility as the capacity of distinguishing between them, and that the absence of the former is consistent with the presence of the latter. The argument proceeds on the theory, that there is a form of insanity in which the faculties are so disordered and deranged, that a man, though he perceives the moral quality of his acts, is unable to control them, and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates, but cannot avoid. Whatever medical or scientific authority there may be for this view, it has not been accepted by courts of law. The vagueness and uncertainty of the inquiry which would be opened, and the manifest danger of introducing the limitation claimed into the rule of responsibility, may well cause courts to pause before assenting to it. . . . The doctrine that a criminal may be excused upon the notion of an irresistible impulse to commit it, when the offender has the ability to discover his legal and moral duty in respect to it, has no place in the law.”

It might be added, that, while Rapallo concurred in the result, he did not concur in the opinion, it being based upon a radically different conception of mental disorder from that adopted by him in the insurance case.

The views which are thus approved and sharply laid down, following very many precedents in England and this country, are unquestionably contrary to the undoubted facts and phenomena of mental disease, and are as sure to be modified as a more rational theory of mental action becomes prevalent, as was the theory of creation, founded on Hebrew tradition, to be done away by the progress of geological science. As Mr. Justice Doe well said in the case of *Boardman v. Woodman*,<sup>2</sup> —

“That cannot be a fact in law which is not a fact in science; that cannot be health in law which is disease in fact: and it is unfortunate that

<sup>1</sup> 52 N. Y. 467.

<sup>2</sup> 47 N. H. 120.

courts should maintain a contest with science and the laws of nature upon a question of fact which is within the province of science, and outside the domain of our law."

The New York Court of Appeals distinctly holds that an irresistible impulse to commit a crime, it being recognized as a crime by the offender, is no excuse.

Among the many cases that might perplex the learned judges in the application of the rule thus solemnly laid down is one related by Dr. Maudsley of a woman who suffered somewhat from depression, but otherwise attended to her duties as usual. One day she suddenly seized one of her children, and, before she could be stopped, beat its head against the floor until it was dead. She felt the horror and criminality of the act, even when she was committing it; and, when confined to an asylum, she experienced the bitterest remorse for what she had done; but she could never tell why she had killed her child, of which she was so fond.<sup>1</sup>

This is but one instance of many where the offender has a perfect understanding of the criminality of the act, dread of it in advance, and the bitterest regret after it is done; where he "perceives the moral quality of his acts, but is unable to control them; and is urged by some mysterious pressure to the commission of acts, the consequences of which he anticipates, but cannot avoid." Judge Andrews assures us that this sort of doctor's nonsense finds no place in the law, and he would see in

<sup>1</sup> Other recollections blend themselves with the name of Mr. Canning, one of them illustrating a very curious form of mental aberration. In 1825, as I think, when he was Foreign Secretary, and living at Gloucester Lodge, I was one morning called in haste to see a patient at Brompton. Scarcely had I entered the room of this gentleman (for such he was, and had filled a diplomatic office of some consideration), when he eagerly besought me to protect him against himself. He told me that a propensity to kill Mr. Canning had come upon him suddenly, and so strongly, that he had taken these rooms at Brompton to be in the way of satisfying the impulse; but against this insane will (induced by some supposed official injustice) a sounder feeling was struggling within him, and for the moment gained mastery enough to lead him to seek for instant restraint. I of course lost no time in providing it; warning Mr. Canning, meanwhile, to return to Gloucester Lodge by a different road. These strange cases of what may be called *duplicity* of the will are not rare in the long catalogue of mental infirmities. In lighter and less critical form, such incongruities enter into the most familiar moods of character, and acts of life; but even here they need to be self-recognized and resisted, to prevent their gaining mastery over the mind. The consistent and firm command over the will ranks among the highest attainments of man. — *Recollections of Past Life*, by Sir Henry Holland, p. 177.

that poor woman a criminal without excuse. According to his own definition, there would be no possibility of her escaping punishment ; but the common sense of the jury might be relied on to correct the absurdities of the perfection of human reason.

In the opinion of the court, it is said that all bad actions are but the result of impulses, and that the design of the law is to make people restrain their impulses. Dr. Maudsley well puts the reply to such a proposition in reference to insanity: "No power of will can hold in check the progress of disease ; and it is truly a piece of strange irony to exact such a controlling power in a disease, the special character of which is to weaken the power of will, and to increase the power of passion ; to lessen the power of controlling what is more difficult to control."

Judge Andrews fears the vagueness of the inquiry which might be opened. We are ourselves so little versed in the intricacies of mental action, that an inquiry as to the knowledge of right and wrong possessed by another, the innermost workings of his mind, his hidden beliefs on the moral character of acts, on the distinction between right and wrong, which some say has its foundation in expediency, some in statute, and some in revelation, on which no age nor nation agrees, — that such an inquiry would seem far more vague and uncertain (however simple it might be for ordinary juries) than to ascertain whether a man had suffered from epilepsy, or had relatives or ancestors who had been insane ; whether no rational consideration would seem to account for his acts ; whether his sayings and doings differed radically from those of the mass of mankind, and could not be reconciled with any rational purpose or self-controlled will ; and whether the alleged crime appeared to be the legitimate result of such mental disorder. It would seem that one's actions could be observed by others, and that the common sense of mankind could determine how far such actions varied from those of the average of reasonable men ; how far they appeared to be controlled by the motives which men ordinarily feel. The inmost hidden beliefs, the workings of the individual conscience, the moral natures of men, do not seem to us by any means easier matters to investigate.

Other courts have adopted other rules by which insanity may be known, all of them more accurate than the time-honored test of knowing right from wrong, but all of them deficient in so far as they take some few phenomena as the signs of a disease mul-

tiform in its phases. Delusion, a sudden irresistible impulse, delirium, a want of knowledge of the physical consequences of an act, have each been laid down as the tests of diseased mental condition, sufficient to free from responsibility. Some courts, notably those of New Hampshire, show a tendency to hold what is certainly the only correct theory, — that no one state or infirmity of mind can be assumed as the test of insanity; that, as is said by Mr. Justice Doe, “even if it is necessary that the law should entertain a single medical opinion concerning a single disease, it is not necessary that that opinion should be a cast-off theory of the physicians of a former generation;” and that the question is, whether that complained of was the result of disordered and diseased mental action, which is a matter solely for the jury in a consideration of all the evidence.

Dr. Maudsley criticises with great force the inconsistent positions of the law on this subject, as it is usually laid down. He gives numerous cases where crime has resulted directly from a disordered condition of the mind, but where no one could say that the offender was unaware of the distinction between right and wrong; where it could not be claimed that the action resulted from delusion, or was caused by an irresistible insane impulse. Some of these are very curious. One of the most striking is that of a young man whose most marked peculiarity was a strong taste for windmills, in watching which he would spend hours, and almost days. Desirous of ridding him of this absurdity, his friends had him taken to a part of the country where there were no windmills. Thus far he had shown no tendency toward immoral action, no lack of appreciation of the restraints of morality and the law. But in his new home he set fire to the house where he was living, and, taking a young child into a wood, attempted to murder it, and mangled it in the most horrible way. His desire was, on account of these acts, to be removed to some place where he could again watch his beloved windmills.

Here was no delusion, no irresistible impulse, no ignorance of right and wrong; and yet this youth's action was as entirely the result of a diseased mental condition as that of the maniac who kills his keeper in a fit of frenzy.

Another case is that of a boy who committed a most brutal murder, — a murder which the judge said, in passing sentence,

was more barbarous and inhuman than any he had known during his twenty years of judicial experience. The boy confessed the crime without hesitation, and said that he committed the murder because he thought it would be pleasant to be hung. He was convicted, and the judge sentenced him to death. "Thank you, my lord," said the prisoner when the sentence had been pronounced. As Dr. Maudsley says, with considerable piquancy, "He was in due course executed; the terrible example having been thought necessary in order to deter others from doing murder, out of a morbid desire to indulge in the gratification of being hanged." Certainly the position of the law, when it says, that, if criminal action is the result of a diseased mental condition, the perpetrator should not be punished, and yet sentences to be hung such a youth as this last, is very lamentably inconsistent.

But advancing scientific research will probably make necessary an entire remodelling of the doctrine of responsibility. While punishments are, even now, nominally said to be for the protection of society, yet the test of responsibility laid down in criminal cases shows that this is not the controlling idea, but, on the contrary, the notion of inflicting such punishment as is deserved by him who did the deed. It is the people taking the place of the old family avenger of blood, standing in the stead of the person wronged, and visiting upon the culprit a penalty proportionate to his offence. Acting on such a theory as this, it seems necessary to say that a man should not be held responsible for an act to which he is impelled by an irresistible impulse, or which he commits when bereft of reasoning powers. Hence have arisen the rude attempts of the law to allow insanity to be introduced as a defence.

Now, we do not hesitate to say that this is an utterly false conception of the scope and intention of criminal law, and that the attempts to administer it on such a basis must lead to hopeless confusion and inconsistency. In his definition of the different classes of insanity, Dr. Maudsley speaks of moral insanity; that is, a condition of mind wherein the moral powers, the affections, the instincts of right, are totally perverted, or wholly lacking. As the author says, "This is a form of mental alienation which has so much the look of vice, that many persons regard it as an unfounded medical invention." Yet there is no doubt that there

are many persons who are congenitally utterly destitute of the moral element. It may be styled insanity, or by some other name; but a large portion of the race do not receive any thing that deserves to be called morality in their heritage of manhood.

One may say that this is nothing but wickedness; but with equal force one could charge with criminality the cat who kills the canary. Not the mere knowledge that a thing is forbidden, but a sufficiently developed moral nature to have some aspirations for the good, some shrinking from the bad, should be found in a man, before we can solemnly upbraid his wickedness.

This is recognized in a rough way. No one holds a child and a grown man to the same degree of moral responsibility, or believes that a native of Terra del Fuego should be punished for what would be most reprehensible in a London merchant. But the law, proceeding in the perfection of reason, has seen fit to declare, that, while it professes to mete out punishment in proportion to the guilt of the offender, it will hold equally accountable the man who was born in infamy, bred in vice, and reared to crime, and the philosopher who meditates on the beauties of morality and the perfection of the infinite.

It shows how little we reflect on the inconsistency of things to which we are accustomed, that those who would cry out against a maniac's being taken to execution see nothing but a just retribution in the punishment of some one, who from inherited nature, and his whole course of life, has been reared for the gallows, as much as the son of an emperor for the purple.

All accurate physiological study shows how entirely the moral as well as the physical qualities of a man are controlled by his antecedents. From the faculties and tendencies with which he is born, the nervous organization, the physical condition, the convolutions, of the brain, acted upon by the surroundings and associates among which he finds himself, results the entire nature of the man. One can say that he can free himself from these, and so modify or control innate tendencies; but his inherited character is such, that he can no more do so than he can write an epic poem. The law of hereditability extends through all the realm of nature with unvarying force; and grapes will be gathered of thorns, and figs of thistles, quite as soon as moral fruit will be grown on corrupt physical and moral natures.

The convict who exclaimed to his keeper, "Lord, how I do

love thieving! if I had thousands, I would still be a thief!" deserved, perhaps, as severe reprobation for picking a pocket as would some Yale professor; but it seems quite as reasonable to say that he inherited a diseased mental and moral condition, the result of ignorance, sickness, and ancestral vice, of which thieving was the legitimate fruit, as much as some peer inherits his gout from ancestral high living.

In whatever subtleties on the perplexing mysteries of free will people still choose to indulge, practically no one denies that the antecedents and surroundings which are entirely beyond control, determine, for the most part, one's character and one's actions.

Now, we are unable to see why the law should say, that if a man inherits a homicidal impulse, and the jury find that he killed a person under the influence of that insane tendency, overcoming all powers of reason and will, then he should go free from punishment, but that, where one who is born of criminal stock, with a scrofulous and inferior physique, with low mental powers, and trained from childhood to earn a livelihood by vice, commits a crime which is the legitimate and the inevitable result of all this, he should stand before the community as an offender without excuse, because he is supposed to possess that most uncertain and undefinable quality styled free will.

In the latter case, as well as the former, the crime is the necessary result of causes in which the alleged criminal had no part, and over which he had no control; and, if punishment is to be inflicted on the idea that it is a retribution for conduct which might have been avoided, it is as inconsistent to punish the latter as the former. Sooner or later, these principles will have to be recognized by the law.

What effect will this have upon its practical administration? It will involve a new, or at least a modified, conception of the function of criminal justice, and of the basis on which it stands.

The idea must be distinctly recognized, that the law has no right to punish any man simply for the reason that what he has done is morally wrong. It is needless to say that this has been for centuries the conception of what was the law's most proper function. Gradually, however, the idea has taken form, that the law's only duty is the protection of society. It is manifest, that whether we investigate the moral guilt of the offender and the proportionate punishment, or try to learn what will be the meas-



ures by which society can best be protected from further injury or danger, will make a very radical difference in our procedure.

Dr. Maudsley does not take this view of the function of the law. He assumes the test of responsibility to be the correct one for the law to consider, and then argues that many executions have been judicial murders.

It cannot be denied, that when the law assumes to act on the theory of responsibility, and at the same time says, in the language of the New York Court of Appeals, that the courts will not hold that the power of choosing right from wrong is as essential to legal responsibility as the capacity of distinguishing between them, or that there may be a form of insanity in which the faculties are so disordered and deranged, that a man, though he perceives the moral qualities of his acts, is unable to control them, it simply ignores physiological facts which it will some day have to acknowledge.

On the other hand, if the doctrine of responsibility were correctly carried out, it would certainly result in very great injury to the community. The theory is so radically wrong, that it cannot be carried out, and would be injurious even if it could be.

Dr. Maudsley, who claims immunity for all the insane, furnishes an example of the benefit to be thence derived. He relates with great complacency the following instance of a person's escaping the gallows: A man named Bisgrove had been subject to epilepsy, and fits of violence. Wandering about one night, after first drinking a little, he saw a man lying asleep, was seized with an impulse to kill him, took up a large stone, and dashed his brains out. He then lay down and went to sleep by the side of his victim. He was convicted at the trial, the facts of his early history and epilepsy not being elicited. A clergyman discovered them, and, with the earnest solicitation with which the clergy so frequently endeavor to preserve the pests of society, obtained a reprieve for the man, who was then sent to the lunatic asylum. "Thus," cheerfully remarks Dr. Maudsley, "a man escaped hanging who was unquestionably affected by epileptic insanity." A foot-note which he has added to his book may somewhat diminish the pleasure derived from this happy escape, and suggest some doubt as to whether it was any great gain to the community that a man with irresistible homicidal tendencies should be carefully preserved. It is there naively stated, in somewhat

curious contrast with the complacency with which he narrates the fortunate results of the clergyman's intervention, "Bisgrove has recently made his escape from the asylum, and is still at large, unless, as the authorities of the asylum believe, he has committed suicide. The manner of his escape was significant: He was walking with an attendant, behind whom he got, and whom he knocked down by striking him violently on the head with a brick or stone. He then beat him on the head with the stone, leaving him insensible and apparently dead, and made his escape."

No case could bring up more fairly the proper theory of the execution of the law. Is it a desirable thing that a man afflicted with so terrible a tendency that he can only be allowed to lead a life in confinement, utterly useless to himself and all others, should be saved from the gallows that he may murder an innocent man and kill himself?

If human life, under any possible circumstances, is so precious and sacred a thing, certainly the lives of keepers are to be preserved as well as those of criminals. The fact that we cannot apportion the responsibility of crime between the man and his ancestors and surroundings is by no means a reason why punishment, and even extreme punishment, should not be inflicted, not, indeed, for punishment, but for preservation. Society has claims of far higher importance than those of any individual to continue a course of life which may be injurious. The prejudice against capital punishment has reached such a mawkish extreme, that it is deemed a graver thing to have done with a worthless existence than to condemn it to utter uselessness and impotence, and leave the criminal to drag out a life debarred from all that gives life its dignity and its value. We confess that we do not share in this sentimental tenderness. We do not share Dr. Maudsley's joy, that a man, overpowered by a diseased mania for homicide, should be preserved to drag out his days in an asylum, and indulge his insane passion at the expense of innocent lives. This physical existence, — the mere animal life of a man, without the power of being of benefit to his fellows, or of raising himself in the scale of thought and feeling, — instead of being so sacred and precious a thing, is not a thing of very much consequence; a thing of no consequence at all in comparison with the interests of the community, or the safety of those lives which are of some value to themselves and others.

While the theories of modern life insist upon the absolute freedom of individual thought and action, so far as they do not interfere with others, they also inculcate very strongly the doctrine, that the individual is absolutely subject to the welfare of the public, and is only a thing of any importance in so far as he does his part in the general development of society "in working out the great design of perfection." Society has no right to permit any crime simply because it is a crime. With a man's innocence or guilt, with the moral imperfection of his acts, it has no concern. The endeavor to insure the salvation of our neighbor's soul, or play the part of eternal justice with his misdeeds, must be abandoned. The principles of individual liberty forbid any such interference. Some of the views suggested in this article may perhaps show wherein it is impracticable.

We have seen that the law has gone on assuming that it could determine the moral character of a man's acts; and so it has declared that certain symptoms of aberration which it has been pleased to style insanity would constitute an excuse for crime; that he who was uncertain as to the devious boundaries of right and wrong, and he alone, could not be held to be responsible for his acts.

An advancing physiology and psychology show that there is a vast amount of action for which the most rigid believer in free will would not hold the actor responsible, which is not covered by this narrow exception; and not only in those who have such an amount of abnormal mental bias that they are called insane, but in almost all those who are brought to trial for offences against society, their immoral tendencies are so largely the result of inherited qualities, of ancestral vice, of diseased physique, and degraded surroundings, that it is simply a burlesque of justice to pretend to say to what degree of responsibility they can be held.

Until lately, the ignorance of physiology and the absence of any study of social science have prevented our feeling the anomaly of our present theories. It will be felt more and more; and the law cannot permanently base its action upon an erroneous conception of man's nature and the facts of life.

Acknowledging, then, that we have no right to punish our neighbor for his action simply because it is contrary to our own views, and acknowledging how impossible it is to ascertain how

far any man's acts can be considered the result of his own free will, we find that the only foundation on which criminal justice can rest at once consistently and equitably is on the right of society to insure its own preservation and welfare.

Our duty is to ascertain, in every offence dangerous to the public, not to what degree of responsibility the offender can be held, but simply in what manner society can be effectually guarded from future danger. Keeping in view the interests of the criminal himself, so far as they can be considered with safety to others, the object to be considered is, not what is a just retribution for the offence, but how can the offender best be reformed, or prevented from doing further harm.

The defence of insanity, as it is now allowed in the majority of cases, is an anomaly which will fill with surprise the Bentham of some future day.

The case being submitted to the jury simply on the question of responsibility, if they find that the crime was the result of some insane tendency, the product of an overturned will, of a totally diseased conscience, the offender goes free, perhaps to indulge again his morbid impulses.

We are thus, by our doctrine of responsibility, reduced to the absurdity, that a man who commits murder from some exceptional cause, hatred or revenge, which may never again exercise any force over him, is hustled out of existence; while another, whose acts are found to be the result of some insane and uncontrollable tendency, is generally returned to intercourse with his fellow-men. It is difficult to see how the law thus acts as society's protector.

In the system of law which we may some day hope to see, the functions of the jury will be confined to determining the perpetrator of a crime, and possibly such circumstances, tendencies, or mental qualities, as may have induced the act. It will be the duty of the officers of the law to see that society is preserved from men who are dangerous to it, and that, where it seems possible, they may be rendered more fit for taking a useful part in the life of the community. We shall thus be free from the absurdity of trying to apportion our punishment to the individual responsibility which no judge or jury can correctly determine. We shall be delivered from the reproach of having the defence of insanity turned into a burlesque, at times bringing to the

gallows those, who, if responsibility be the test, are no more guilty than if they were brute animals, and at times furnishing an excuse for turning loose on the community those who have openly and wantonly violated the precepts most necessary to its safety and preservation.

JAMES BRECK PERKINS.

PLEADING AND PRACTICE.<sup>1</sup>

THIS new edition of Mr. Chitty's great work seems to have substantial merits over any of its predecessors. The condensation from three volumes to two, although somewhat bulky ones, is an advantage; and the greater size of the volumes is quite compensated by the clearer type. The subject-matter has also been materially improved, both by the removal of forms now rendered obsolete, and by the addition of later cases, especially in the second volume. This latter feature has, by the fulness and careful arrangement of the cases, become not merely a satisfactory digest of the law of pleading, topically treated, but also a general text-book of the law in the branches touched upon. This is necessarily so, because pleading, like evidence, falling within the category of applied, as distinct from abstract law, knows no limit of topics, but covers, speaking in general terms, the whole domain of the law, in setting forth the manner of its presentment and application; and if it be true, that to understand the laws of evidence well implies a sound knowledge of law in general, it is true in at least an equal degree of the rules of pleading.

The present edition of Mr. Chitty's work is the sixteenth American, from the seventh London edition, the last published in England, and which received the editorial supervision of Mr. Greening as long ago as 1843. It is somewhat remarkable that so long a time should have elapsed in England without a new edition of a book of such excellence as this, and standing confessedly without a rival in its peculiar field, especially in view of the important changes in the statutory law since, made by the acts of 15 & 16 Vict., c. 76, and 17 & 18 Vict., and similar enactments. It is still more remarkable that it should have issued twice as often from the American as from the English press, especially when we consider that it is nearly thirty years since the code of procedure began to be adopted in many of

<sup>1</sup> *Chitty on Pleading*, &c. Sixteenth American, from the seventh London edition. G. & C. Merriam. 1876.

the States, "the central conception" of which "is the abolition of the distinction between legal and equitable suits,"<sup>1</sup> and which "is completely severed from the ancient common-law modes," and "entirely abandons all the arbitrary, formal, and technical notions which were their very essence and life."<sup>2</sup>

We shall endeavor to show farther on that so sweeping a statement as this is hardly justified by the existing condition of remedial process under the code, even in the State of its first adoption, — New York. At present it will suffice to point to the fact of the frequency of editions of Chitty's treatise as a somewhat marked commentary on the broad statements we have just noticed, and of the continued usefulness of a work professedly devoted to that much-reviled system, "special pleading."

Indeed, it could hardly be otherwise. The value of special pleading is not limited wholly to any system of procedure; and although one or another set of legal reformers may seek to dispense with it, whether by directly and in terms abolishing it, as was once done in Massachusetts,<sup>3</sup> or by curtailing its features, as attempted by the Practice Act of 1851 and 1852, or fusing it with the rules of a different system, and then qualifying the whole, as was sought to be done by the New York code of 1848, and lately by the recent judicature acts of 1873 and 1875 in England, yet the fact remains that the newer systems simply proceed upon the old principles in substance, and that the change is much more one in name than in fact.

The reason of this lies in the fact that the authors of these systems are dealing with the same rules of law, — these they do not profess to qualify, and do not except by indirection, — and are seeking merely a new mode of presenting the facts in compliance with them, with the same end in view; namely, an intelligible issue to be passed upon by the court or the jury. This the science of special pleading did, in perfect accordance with the rules of logic, artificially and technically, it is true, and with an eye to the system and its precise working, that not merely the single case might be definitely dealt with, but that a precedent might not be set which would have to be departed from in the next instance of a like issue.

The defects of the system were in a great measure due to the

<sup>1</sup> Pomeroy, *Remedies and Rem. Rights*, Pref. viii.

<sup>2</sup> *Id.*, Pref. vi.

<sup>3</sup> Act 1836, c. 278.

rigid and subtle metaphysical notions of the age of its early development, when the hair-splitting abstractions of scholastic philosophy invaded all departments of letters and culture, and the various branches of the law afforded almost as congenial a field as theology itself for the display of the verbal refinements and distinctions without a difference which Shakspeare satirized and Bacon exploded. That "an act" had "three branches, to act, to do, and to perform,"<sup>1</sup> was not merely "crownor's quest law," but the grave conclusion of learned judges.<sup>2</sup> So the entirety of a condition, with all its train of absurd consequences, which our courts have not got over even at the present day,<sup>3</sup> is as fantastic as my Lord Coke's "certainty to a common intent, certainty to a certain intent in general, and certainty to a certain intent in every particular."<sup>4</sup> These subtleties, however, are not of the essence of the system. The growth of a period when these niceties were held the mark of real knowledge, it was not unnatural that the science should bear some evidence of the time and place of its origin; but there was equally no reason why it should not be able to discard them, and to show in its own department the same flexibility and power of adaptation which is the just boast of the general common law. Of this, more hereafter.

It is, therefore, not too great an assumption to say, in the language of Lord Mansfield,<sup>5</sup> "The substantial rules of pleading are founded in strong sense and the soundest and closest logic, and so appear when well understood and explained; though, by being misunderstood and misapplied, they are often made use of as instruments of chicane."<sup>6</sup> "Et saches, mon fits," says Littleton, "que est un des plus honorables, laudables, et profitables choses en nostre ley de aver le science de bien pleder en actions reals et personnels; et pur ceo jeo toy counsaile especialment de mitter ton courage et cure de ceo apprendre." And although we should hardly follow Lord Coke in his reason for the derivation of pleading, — *placitum a placendo, quia omnibus placet*, — yet we can appeal to late authority for the value of the system. In their report of the Practice Act in 1851, the commissioners say, —

<sup>1</sup> Hamlet, act v., sc. 1.

<sup>2</sup> Pennock v. Lyons, 118 Mass. 62.

<sup>3</sup> Co. Litt., 308 a; Gould, Plead., c. 8, § 52.

<sup>4</sup> Robinson v. Raley, 1 Burr. 819.

<sup>5</sup> Hales v. Petite, Plowd. 253.

<sup>6</sup> Co. Litt., 302 a.



"No one can have understood this system without a profound admiration of it as a work of human genius, nor without perceiving that it is capable of accomplishing perfectly those objects of first-rate importance where facts are to be tried by a jury, the separation of the law from the fact, and the production of simple and exact issues to be submitted to their appropriate tribunals."<sup>1</sup>

If we have been somewhat prolix in these commendations of this system, it is because nearly a quarter of a century has passed since the adoption of what professed to be a departure from it in this State, and a still longer period in New York since their code ; and to the new generation of practitioners and students special pleading is very much a mere name, referred to only to be slighted. That it was in its substance a sound, clear, and rational system ; that it lent powerful aid to the formation and development of the law while performing the function of applying it ; that it drilled and trained for centuries the legal mind, giving thereby to bar and bench that accurate tone and clear expression which render English reports so generally superior to our own, — is a justice that daily fewer practitioners render to it.

Nevertheless, Chitty maintains his place on the *curriculum* of the law-schools ; and special pleading is professed to be taught, or is a matter of reference, therein. It is admitted in theory, at least, to form a necessary part of the direct training of the student ; and no treatise has replaced his. It is not likely that any will. We are to-day what Charles Lamb designated his young friend who was commencing the study of the law, — legal Chittylings, — and are more or less directly, all of us, the better for the great experience, varied learning, and immense industry of its author, and owe to the science he did so much to develop much of the accuracy or clearness of legal view we may possess.

Yet a formal recognition in theory is all that the science of special pleading professedly receives. It is treated, in the course of legal instruction, as if it were merely a historical branch of the law, and necessary to be considered only in order to understand the growth and development of the law, — as one would recur to the laws of mortmain, or of terms to attend the inheritance, — but never to be put in practice ; and the young lawyer constantly finds himself embarrassed between the necessity of an accurate knowledge of pleading in order to a proper presentation of his

<sup>1</sup> Hall's *Practice Act*, 1851, p. 138.

facts and development of his case and the loose general modes now prevalent which are the natural fruit of the modern attempts at reform in this direction ; and he soon perceives that the codes which professed to replace, or which have been treated as replacing, the old science, are simply built upon it. In spite, however, of the necessity felt of a more accurate habit of pleading, and of the risks from inexact averments, yet the general prevalence of these, and the loopholes of escape held out by the broad provisions for amendment, prevent his attempting to acquire what every one feels to be necessary, and yet every one disregards, —

“*Video meliora proboque deteriora sequor.*”

In Massachusetts, the steps to reform the law of procedure, by modifying the strictness of rules of pleading, were taken in such a different direction from that which New York and other States, and still more recently England, have followed, that we are to-day left standing half way between the old and the new systems. As is apparent from the report of the very able commissioners who produced our Practice Act, they did not propose to do more than modify the old system in the direction of simplicity, and freedom from technicalities ; and, though having before their eyes the then recent experiment in New York, they declined to follow that example, and abrogate, or attempt to abrogate, the substance of the old procedure. Whether the reasons that led them to any substantial change, and, if so, whether the changes as made, were sound, we shall discuss farther on. The reasons, however, which induced them to adopt this middle course, assuming that a change should be made, were, in their own words, these :—

*First*, To “borrow a plan from a system of foreign law would be extremely hazardous and inconvenient. There is an intimate connection between a system of law and its modes of procedure ; and we should fear to try the experiment of raising such a foreign plant in our soil. The habits, terms, modes of thinking, and all that enters into the practical working of proceedings for the administration of justice, and causes them to move kindly and easily, forbid the attempt.”

*Second*, “Still less should we be willing to create a new plan. We have no such confidence in our own powers as would permit us to engage in such a work. Indeed, we have little respect for such a work, in whose-soever hands it may be. From the days when Mr. Locke created a con-

stitution down to the production of the last code that came out of the closet of any professor," (did they mean to refer to the New York code?) "we believe one important lesson has been taught, — that all law should be derived, not created; deduced by experience and careful observation from the existing usages, habits, and wants of men, and not spun out of the brains even of the most learned."<sup>1</sup>

It is true, indeed, that this necessity of deriving and not creating law is less clear in case of the law of procedure than of what we may call the body of the law; and that the former, being more artificial in its nature, is more controllable by positive or statutory enactment than the latter; which, indeed, can hardly be said to fall at all within the domain of statute law, whose normal province is the remedy, and not the rule. But it is difficult to escape from the conclusion reached by the commissioners, that the system of procedure is so intimately interwoven with the law itself, and derivatively with the very constitution of society, that even the legislature, in changing or legislating as to the remedy, must constantly recognize the genius of the people, and the social fabric as well as the law they are seeking to enforce, or they will very soon find that their artificial system will begin to strain and part, like sails inaptly joined to the ship, which every strong breeze and motion tend to tear from the hull they were constructed to propel.

That the commissioners exercised a wise reserve in refraining from greater changes we think cannot be denied. They were rather willing to be the last to set the old aside than the first by whom the new was tried. Whether their system, at least as altered by the legislature, was equally wise in making as much change as it did, we now propose to consider.

Two things are to be borne in mind in looking at the changes introduced by the Practice Act. First, that though the system of special pleading had been adopted by the Colony from the outset, yet our ruder condition of society had rendered it unsuitable, if not impossible, to carry it out in all its precision; and second, that there was neither time nor means available to develop a trained body of special pleaders. Moreover, the Puritans here had early learned to associate law and tyranny. The subservience of the bench and the conservatism of the bar in England placed the one in direct support of harsh forms of oppression

<sup>1</sup> *Hall's Practice Act*, 1861, pp. 145, 146.

and the obnoxious dogma of the divine right of kings, and the other in equally direct opposition to the growing spirit of reform. No more sweeping enactments for the abolition of the forms of law, under the guise of simplifying them, have ever been passed than were introduced by the Barebones Parliament in 1653. A similar spirit here produced the almost entire absence of attorneys or lawyers which continued during the existence of the Colony, after the expulsion of Lechford, who for the few years of his stay had "flourished as the whole profession, — the embodied bar of Massachusetts Bay."<sup>1</sup> Even when the growing wealth of the Province fostered the exactness of law, and gave in the last century to our community a considerable body of well-trained pleaders and some eminent judges, somewhat of the former leaven still existed, and tended to prevent our ever having either a bench or a bar that would compare with Westminster Hall; and when, the conservatism of the legal profession placing them largely on the side of the king, the Revolution drove many of them away, there passed away with them much of the scientific character of the administration of the law, and gradually arose with republican simplicity a distaste and incapacity for the technicalities of its forms. That natural alteration which the flexibility and power of adaptation in the common law and in pleading as its exponent might and would slowly but surely have produced was rudely and forcibly accelerated by political and social events: and though special pleading regulated theoretically our code of practice, yet to some degree the habit of the people was averse to it; but, even more, the capacity of society was inadequate to put it properly in force, or to produce a grade of legal training competent to maintain it as a working system.

Whether such a grade of legal acquirement might not have been attained by the bar of to-day may, at least, be questioned. In 1836,<sup>2</sup> however, moved more by zeal than discretion, the legislature, by an act entitled "An Act to abolish special pleading in civil actions," dispensed with all pleas in bar, and directed that "all matters of law or of fact in defence of an action may be given in evidence under the general issue, and no other plea in bar of such action shall be pleaded;" and the only means by which a definite issue was to be produced, or notice given the

<sup>1</sup> Washburn, *Jud. Hist. of Mass.* 54.

<sup>2</sup> Acts 1836, c. 273.

plaintiff of the issues raised, was by a specification of defence under order of the court, by rules framed for that purpose; and, as if to increase the laxity of procedure, a broader statute of amendment was enacted than had existed before, and special demurrers were expressly "forever abolished."

Under this system, or want of system, as might well be supposed, the practice grew gradually laxer. As each generation of lawyers came forward, it received a training proportionate to the demands upon it in practice; and little wonder can be felt at the deterioration of the bar in consequence.

By the abolition of special demurrers, no defect of form could be availed of; but, as all demurrers were general (*i.e.*, not pointing out the specific matter demurred to), the wider effect was, that the party in fault could have no notice of the legal defects of his pleading, except under a "specification of defence" by order of the court. Moreover, although the sweeping preamble or caption of this act had professed to "abolish special pleading," and had cut off all pleading subsequent to the answer, yet, except special demurrers for defects of form, all other dilatory pleas remained in full force. But, above all, the act, as will be evident at a glance, cut no deeper than the surface. The necessity for a legal presentment of the issues of the cause still remained, and the sole operation of the statute was to have them produced in a vague and unsatisfactory manner. The bill of particulars and the specification of defence were badly overworked, and made to do duty for all further pleadings; since the only penalty for the insufficiency was, that the pleader so in fault was not allowed to offer evidence on the defective allegation before the jury. Hence, as is evident, all issues of law and fact were left to be tried in a lump when the case came on before the jury; and the *nisi prius* judge, with all the haste inevitable under the press of a heavy docket, was forced to rule on the incongruous medley too often presented. In fact, the burden was really thrown upon him to state the pleadings of both parties. It could not be expected that a well-defined question should be raised on exception to his decisions, or that the Supreme Court could apply principles satisfactorily to issues so presented. We may well believe that the habitual caution of our court of last resort, in limiting the decision in many cases to the peculiar facts of the case and avoiding the enunciation of general principles, may have been largely owing to this cause.

Of this condition of practice the commissioners were emphatic in their condemnation. "It may seem," they say, "at first, unaccountable, that in a State which from early times has enjoyed the advantages of a learned and upright judiciary, an accomplished and vigilant bar, and a legislature easily appealed to, and always found mindful of the importance of reform in the proceedings for the administration of justice, we should find ourselves at this day working under what can hardly be called a system of procedure, and which every well-informed lawyer condemns, under whatever name it may go."<sup>1</sup>

It was to remedy such an unsatisfactory state of procedure that the Practice Act was framed under which the law in Massachusetts has been developed for twenty-five years. It has been seen how the eminent jurists who framed the act regarded the broad enactments of the New York code and the merger of legal and equitable forms, and what reasons determined their rejection of that plan. It may, however, be questioned, whether the plan they adopted is not even more amenable to criticism. The question before us to-day is still the same they had then to deal with,—whether the features of the New York code, or the system of special pleading in some modified form, be the best adapted to the wants of our people; but, assuming for the moment that they were right in their rejection of the former, it may be well to examine in some detail this attempt at such modification.

The evils in regard to procedure in our courts to-day are manifest,—an over-crowded docket, which in one county even the labors of three courts, concurrently sitting, fail to dispose of; bad pleading by the plaintiff, often met by worse on the part of the defendant, and hence the imperfect development of issues, to the embarrassment of judge and jury at the trial, requiring frequent amendments, with postponements and delay as the necessary consequences; demurrers of so little value, that they are grown almost as obsolete as the dodo; great difficulty in stating definite exceptions from the confusion of issues and evidence in the cause, and hence a general tendency to report the whole case as an easy way of evading that difficulty, but in fact only transferring it to the law court, who are called upon to apply and settle defined rules of law on ill-defined facts and imperfectly developed questions.

<sup>1</sup> Hall's *Practice Act*, 1851, pp. 187, 188.

To what extent are these difficulties the result of the Practice Act? We think it must be admitted that most of them are.

To begin with the declaration. It was, it is true, provided by the code, as framed by the commissioners, that *one count, and no more, shall be used for each cause of action*.<sup>1</sup> Here a definite limit was set, securing the presentment by plaintiff of his issues singly. The rules of pleading made inconsistency of allegations in one count a ground for demurrer; and thus was afforded a safeguard that each count should present clearly one, and only one, cause of action. It was also provided that any number of counts should be used for different causes of action in the same division.<sup>2</sup> This, we think, was a mistake; not in itself, provided a separate issue could be raised on each, but because, as only one answer was required, one denial would present to the jury as many issues as there were counts, and a dozen matters of *indebitatus assumpsit*, with as many special contracts, might have to be passed upon by the jury at one trial. Badly as this would operate, the legislature made it worse. As it stood, though there might be many issues, each was separately stated by plaintiff. But the legislature abrogated even this small amount of clearness. It was enacted that only one count "*need*" be used,<sup>3</sup> which allowed the pleader to employ as many as he pleased; and whether he stated one or mixed a number of causes in each count was a matter open, if at all, only on special demurrer.

But a corrective was evidently hoped to be found in the requirements of the answer, and that the precise and particular denials pointed out by the statute would define the issues; and though they were all presented at once to the jury, yet they would be presented separately and distinct. But the necessary interpretation put upon the act practically restored the broadest application in effect of the general issue which the code had

<sup>1</sup> Hall's *Practice Act*, 1851, p. 159.

<sup>2</sup> The rule itself as to the plaintiff was evidently borrowed from the English Rules, Hil. T., 4 Wm. IV., Rule 7, which permitted distinct counts for distinct causes of action. But there the resemblance ended. To each of those counts a separate plea, demurrer, or issue, was taken, and each issue so made up was separately presented. Moreover, full costs followed the event of each issue; and if, of the issues raised by the plaintiff, more were found against him than for him, he could not escape without being mulcted heavily. But under our Practice Act, though beaten on all the other issues raised, yet, if successful in one, he would carry costs on his whole case, subject only to single term fees by Rule 15, Superior Court.

<sup>3</sup> Gen. Stat. 129, sect. 2, § 4; *Lovett v. Salem*, 9 Allen, 557.

expressly abolished,<sup>1</sup> and permitted a general denial, which put plaintiff to proof of his whole case.<sup>2</sup> No exception can perhaps be taken to this decision, though its effects were admitted by the court to be in many cases mischievous. A previous decision<sup>3</sup> had practically sustained not merely the right of pleading double, but that the pleas might be inconsistent. The defendant's answer in this case denied *all* allegations, and then set up a defence based on the existence of one of those very allegations. We regard the practice introduced by the doctrine of this case as more dangerous than any other decision under the Practice Act. How far it was likely to be carried in fact may be seen from the case of *Cassidy v. Farrell*,<sup>4</sup> where the answer merely set up that the defendant would introduce evidence! It is true that the words "tending to show," &c., were added; but these amounted to nothing; for all evidence tends to show something, and there are very few propositions short of a mathematical axiom which evidence may not be produced tending to disprove. In the later and recent case of *Suit v. Woodhall*,<sup>5</sup> although reference is made to the conditional character of the second allegation, yet the decision is not based on that,<sup>6</sup> but on the answer being merely a statement of what the evidence would be, not what the *fact* actually was; so that answers may still be framed on the Vermont precedent: "*First*, defendant never had the pail; *second*, if he ever had it, he returned it whole; and *third*, if he did not return it whole, it was broken when he borrowed it." If the Supreme Court meant to decide against inconsistent allegations, contingently put, they certainly have not so expressed themselves.

But possibly the office of the demurrer might have been efficient to cure this, if demurrers had been found under the act to be of any value. Unfortunately, though the act abolished general and restored special demurrers,<sup>7</sup> it did not expressly restore their effect in regard to matters of form. The statute, in defining for what, among other things, demurrers may lie, apparently excludes

<sup>1</sup> Gen. Stat. 129, sect. 15.

<sup>2</sup> *Submarine Co. v. Burnett*, 1 Allen, 410.

<sup>3</sup> *Jewett v. Locke*, 6 Gray, 233.

<sup>4</sup> *Cassidy v. Farrell*, 109 Mass. 397.

<sup>5</sup> *Suit v. Woodhall*, 116 Mass. 547.

<sup>6</sup> A different view is taken in a recent work on practice by Messrs. Buswell & Walcott (pp. 263 and 287); but a careful examination of the cases cited will, we think, show the correctness of the opinion we have expressed in the text.

<sup>7</sup> *Washington v. Ames*, 6 Allen, 417; *Suffolk Bank v. Lowell Bank*, 8 id. 355; *Montague v. B. & F. Iron Works*, 97 Mass. 502.



by inference matters of mere form not enumerated in the act. This was far beyond the effect of any prior act, except the sweeping statute of 1836, c. 273. The early English statutes of 27 Eliz., c. 5, and 4 Anne, c. 16, simply required demurrers for matters of form to be special; and the later requirements of the rules of Mich. T., 38 Geo. III., Trin. T., 11 Geo. IV. (6 Bing. 802), and Hil. T., 4 Will. IV., Rule 2, simply made all demurrers special by enjoining a specification of the cause of demurrer, the last on the margin of the demurrer when filed.

Moreover, the breadth of the statutes of amendment<sup>1</sup> in effect negatives the use of demurrers as well as most preliminary pleas. If the plaintiff or defendant can cure his defective pleading at any moment, and almost to any extent, it is clearly the policy of his opponent not to give him a hint of his weakness until the moment of trial itself, when the press of trial will subject him to the greatest inconvenience and difficulty. The same cause — the facility of amending — also renders the pleader less careful, as he is under no apprehension of being subjected to costs: for his opponent will hardly exact a penalty which he may in a very short time himself be liable to; and he is ready to concede every latitude of amendment, from a lively sense that it may be soon his own turn to seek a similar favor. For as, by the act,<sup>2</sup> all orders allowing amendments may be made by agreement of parties, the court has no necessary voice in determining these, or control of the shape of the action, until called upon to rule at the trial upon the thrice-patched tissue of the parties' allegations.

It is true that the decisions of the court have set some limit to the permissibility of amendments, even under the Practice Act. It has been distinctly held that the want of a declaration at entry is not cured by these sections (40–42) of the act, and hence is fatal in the lowest courts, as these are not included in the express language of sects. 7, 8, and 9;<sup>3</sup> thereby reaffirming the ancient though wholly technical rule, that for an amendment there must be something to amend by.<sup>4</sup> Whether an entirely new party, sole plaintiff or defendant, can be substituted, may be doubted. In one case a guardian was allowed to amend and sue as next friend of the heirs, his wards.<sup>5</sup> In another case a hus-

<sup>1</sup> Gen. Stat., c. 129, sects. 40–42.

<sup>2</sup> *Keenan v. Knight*, 9 Allen, 257.

<sup>3</sup> *Jennings v. Collins*, 99 Mass. 29, 32.

<sup>4</sup> Gen. Stat., c. 129, sects. 59, 60.

<sup>5</sup> *Brown v. Washington*, 110 Mass. 529.

band was allowed to come in as tenant by curtesy in place of his wife, who had died before date of writ.<sup>1</sup> In an earlier case it was held that an action brought in the name of the assignee could not be amended by inserting the name of the assignor,<sup>2</sup> while in others no amendment was attempted.<sup>3</sup>

On the other hand, the source of the large construction of the act lies in the words permitting an amendment to render the action the one for which it was "intended to be brought." Since this statute, no objection exists to changing from tort to contract, or from contract to tort:<sup>4</sup> and perhaps a change of the sole plaintiff or defendant may be authorized under this rule; certainly an entirely new cause of action may be substituted.<sup>5</sup> Moreover, the decision of the court allowing the amendment is conclusive on the identity of the cause of action;<sup>6</sup> and it presumed that the agreement of the parties would have the same effect.

It will be apparent, even from this cursory review, how broad a license is bestowed on the pleader, and what an invitation is in fact held out to laxity by the combined operation of the causes described. That this invitation has been largely accepted, the state of procedure in our courts to-day will clearly and painfully show; and these radical changes were all made concurrently. How great a step was taken will appear by comparing this with anterior legislation. No prior provision for amendment of like width existed under our Massachusetts law or at the common law. The statute of 1784, c. 28, § 14, simply provided for the rectification of "circumstantial errors or mistakes." This was incorporated in the Revised Statutes; and further provision was then made by sect. 22 of chap. 100, that any amendments "in form or substance" could be allowed before judgment; and, after judgment, defects of form were cured. Before this, the court had held that a count for goods sold could not be amended by substituting a count on a note for the price,<sup>7</sup> as this was a new cause of action. Even after the provisions of the Revised Statutes above stated, it was not in the power of the court by amendment to change an action of tort to contract, or the reverse. The power of the courts was held to be limited;<sup>8</sup> and the saving

<sup>1</sup> *Emory v. Osgood*, 1 Allen, 244.

<sup>2</sup> *Haskell v. Lambert*, 16 Gray, 592.

<sup>3</sup> *Oliver v. Col. Gold Co.*, 11 Allen, 238.

<sup>4</sup> *Mann v. Brewer*, 7 Allen, 202.

<sup>5</sup> Gen. Stat., c. 129, sect. 82.

<sup>6</sup> *Drew v. Beard*, 107 Mass. 64, 76.

<sup>7</sup> *Van Cleef v. Therasser*, 8 Pick. 12; *Brigham v. Este*, 2 Pick. 420, 424, 425.

<sup>8</sup> *Gulford v. Adams*, 19 Pick. 876, 878.

provision of the act of 1836, c. 273, permitting amendment where the plaintiff had mistaken the "form of action suited to his claim," did not allow such a change, nor even authorize amendment within the same division of actions, if the technical cause of action was not identical.<sup>1</sup> The act of 1839, c. 151, § 1, like the provisions of the 9 Geo. IV. c. 15, and 3 & 4 Wm. IV. c. 42, from which it was probably borrowed, simply permitted amendment of a variance between the recital of the pleadings and the proof; and the act of 1833, c. 194 (Rev. Stat., c. 100, sects. 1 to 7), authorized amendments, notwithstanding misjoinder. Indeed, this same species of amendment had been allowed by the courts prior to this statute,<sup>2</sup> under their general common-law authority, as is suggested;<sup>3</sup> though this may admit of a doubt, unless a larger authority of the court over the record was licensed by our somewhat inartificial practice than existed at the common law.

At the common law, amendment was only in the power of the court until their record was made up.<sup>4</sup> While the oral debate, called the *parol*,— which was the first form of pleading, — lasted, any amendment could be made;<sup>5</sup> and, when written pleadings replaced the *parol*, they formed no part of the record until the roll was completed for the jury-trial. After this they were beyond the power of the court, except so far as aided by statute.

On the other hand, the statutes were of very limited operation. All those enacted from the 14 Edw. III., St. 1, c. 6, to the 8 Hen. VI., c. 15, were simply for the correction of clerical errors. The several so-called statutes of *jeofails*<sup>6</sup> only aided by verdict matters of form not affecting the merits of the action. By the act (called by Twisden, J., the omnipotent act) 16 and 17 Car. II., c. 8, a variety of defects of technical recital were relieved after verdict when "not being against the right or matter of the suit." The first statute which gave the power to judges to relieve against a variance at trial was 9 Geo. IV., c. 15; and this only in case the evidence was in writing, and the defect did not go to the merits of the cause. The 3 and 4 Wm. IV. extended this power to variances by oral evidence; and it was not till the

<sup>1</sup> *Mann v. Brewer*, 7 Allen, 202, 203.

<sup>2</sup> *Colcord v. Swan*, 11 Mass. 291.

<sup>3</sup> *Fück v. Stevens*, 2 Metc. 505. Per Shaw, C. J.

<sup>4</sup> 2 *Tidd's Pract.*, 717; 3 Bl. Com., 406-408.

<sup>5</sup> *Id.*

<sup>6</sup> 82 Hen. VIII., c. 30; 18 Eliz., c. 14; 21 Jac. I., c. 18.

15 and 16 Vict., c. 76, that the power of amending for variance in matters of substance was conferred on the English courts. It may therefore be doubted if any such broad power of amendment in case of misjoinder or otherwise for matter of substance existed under the common law even as adopted here ; and, when exercised, it was probably only under a liberal construction of the provision of the act of 1784, c. 28, § 14.

Lastly, it was the result of the act of 1836, c. 273, already referred to, to dispense with all pleadings after the plea of the general issue, and specification of defence. An express provision to this effect was inserted in the Practice Act of 1852. It is true, the plaintiff may demur, or, under order of court, may be compelled to reply to defendant's answer. But this is rarely if ever done. It must, however, admit of doubt, whether not merely the replication, but still further pleadings, are not rendered additionally needful by the very breadth and laxity of the antecedent pleadings. Certainly a defendant who knows that there is little risk from a demurrer, even if one would lie ; who has the warrant of statute and decision to include double and inconsistent pleas in his answer, — has an additional inducement to make that answer loose if he feels that he is not liable to be followed by a replication taking issue on his imperfect averments, and with perhaps fatal consequences to his defence. At all events, such a replication would define more clearly the issue for the jury and the court.

If authority were worth referring to in support of experience in considering the value of the Practice Act, we might cite Shaw, C. J., who on more than one occasion gave no uncertain sound to his opinion of its tendency ; *e. g.* : —

"This case comes before us in a somewhat unsatisfactory manner, and seems to show what is likely to arise under the act abolishing special pleading, and more especially under the new Practice Act, in pursuance of the provisions of which this action is brought."<sup>1</sup>

More than one of the features on which its framers largely relied have been removed. Thus, besides the change allowing many counts for one cause of action already noticed, the legislature allowed the legal effect of written instruments to be set out instead of a copy ; and finally<sup>2</sup> the legislature abolished

<sup>1</sup> *Patten v. Deshon*, 1 Gray, 325. See also *Edwards v. Carr*, 13 Gray, 284, 285 ; *Shaw v. Bos. and W. R. R.*, 8 Gray, 45, 68.

<sup>2</sup> Act 1870, c. 68.

the only oath which had been required in course of ordinary proceedings, and which the commissioners had hoped would "make a great, and, we believe, extremely beneficial change in our law. Parties will be enabled to obtain speedy judgments at small expense on claims to which there is no defence, and in recovering judgments for which there should be very little delay. Taken in connection with other parts of this act, we believe it will be found that the general effect of these provisions will be, that defence will seldom be attempted when it is known to the party that none exists," &c. Alas that so confiding a trust in the effect to be derived from an appeal to the conscience of the bar or of their clients should have proved unfounded! The net result of experience being, that, far from diminishing the number of actions, it only added perjury to delay, a more prosaic legislature replaced it by the late, and, on the whole, fairly useful statute for speedy disposal of indefensible actions.<sup>1</sup>

It is to be borne in mind that the Practice Act only proposed the modification of special pleading to the extent of its own express enactments, and, where these did not in terms apply, left the former system in full operation.<sup>2</sup> Thus, in a recent case,<sup>3</sup> it was decided that the same precision of language was necessary, now as formerly, to distinguish tort from contract; and it has been uniformly held, that though the names of the different actions of the same division were merged in one, yet that the appropriate evidence was as requisite as before the act to maintain the old distinctive forms.<sup>4</sup> In a very recent case, the technical rule, that a plea with a tender and profert *in curia* admits the plaintiff's cause of action, was applied, although the plea set up that the tender was of rent, and the plaintiff only sued for use and occupation.<sup>5</sup> It is, indeed, a ground for serious criticism of the Practice Act, that there are too many points in which it is uncertain what the statute covers, and how far the common-law rules apply. It was, moreover, a grave disadvantage to have these rules, which a long course of decisions had ascertained and precisely defined, replaced by new rules, to fix whose

<sup>1</sup> Act 1874, c. 278, § 8.

<sup>2</sup> Hall's *Pr. Act.*, 1851, p. 146.

<sup>3</sup> *Cooper v. Landon*, 102 Mass. 58, 60. See *Pearson v. Howe*, 1 Allen, 207.

<sup>4</sup> *Robinson v. Austin*, 2 Gray, 564; *Winship v. Neale*, 10 id. 382; *Parsons v. Smith*, 5 Allen, 578.

<sup>5</sup> *Currier v. Jordan*, 117 Mass. 260.

limits required a like course of adjudication, continued for a period of similar length.

It is obvious, therefore, that special pleading, in its substance, is not abolished here; and even in its essential forms it still remains in the States which have not yet adopted a code. As little has it departed in substance in these latter jurisdictions. Its rules not only expressed the logical development of an issue, but were too closely in accord with the common law itself to disappear while that remained in force. The language of the courts in these jurisdictions, after many years' experience of the code, admits this: "The codifiers, while professing to abolish the distinction between forms of actions, found it impossible or impracticable in many cases to effect their object."<sup>1</sup> And, in an earlier case in the Court of Appeals,<sup>2</sup> Selden, J., said, —

"Although the code has abolished all distinction between different forms of action, and every action is now in the form of a special action on the case, yet actions vary in their nature, and there are intrinsic differences between them which no law can abolish. . . . The mere formal differences between such actions are abolished: the substantial differences remain as before."

Other similar expressions might readily be quoted: some of them may be found cited in the preface to the present edition of Mr. Chitty's book.

We have offered with some diffidence these criticisms on the Practice Act of Massachusetts, feeling that the simplification thus attempted has not been productive of the results hoped; that, on the whole, practice has become looser, but not really easier; and that now is a fit season to consider whether a recurrence to some of the essential features of the system of special pleading is not advisable to cure the admitted existing evils. We hardly deem it necessary here to discuss the other alternative, — the adoption of all the distinctive features of the codes of New York or England. We do not think that these have yet vindicated their claim to make the process of law simple, easy, inexpensive, and complete. At all events, the change contemplated is so radical, that we cannot suppose our community prepared to make it until satisfied that the common-law system cannot by any simple modification afford practically the desired results.

<sup>1</sup> Mullin, J., in *Booth v. F. & M. Nat. Bk.*, 65 Barb. 458.

<sup>2</sup> *Gould v. Asseler*, 22 N. Y. 225, 228.

In framing the Practice Act, the commissioners criticised that system as too difficult for application by a bar like ours ; and the effect of their own work was to justify that assumption by disqualifying that bar still further. But we think that the correctness of their assumed premise is growing daily less. With the natural increase of the numbers of the legal profession, and the tendency to specialize departments which is rapidly developed by the growing wealth of the community, the argument that the bar cannot, as a class, acquire the requisite skill to apply at least a modified system of exact pleading, or that pleading cannot be made a special department, is as rapidly losing force. What modifications are required, the experience acquired under the operation of the Practice Act would readily determine. We have, in this paper, touched upon this subject in the reverse way by suggesting some particulars in which the act seemed to have failed in its purpose.

It also appears to us that criticisms on the system of special pleading have been taken too much for granted, and with too little fair examination of their just foundation. In the commissioners' report, even Lord Coke is put on the stand as a "disinterested and competent witness" to the fact that the system of special pleading did not work well in practice, even at the common law ;<sup>1</sup> but that the isolated passage there quoted referred more to the negligence of the bar than to the inherent defects of the system is apparent a little farther on, where, speaking of the same period, Lord Coke says,<sup>2</sup> "In the reign of Edward the Third, pleadings grew to perfection, both without lameness and curiosity ; for then the judges and professors of the law were excellently learned," &c. And again, "In the time of Henry the Sixth, the judges gave a quicker eare to exceptions to pleadings than either their predecessors did or the judges in the reign of Edw. the Fourth, when our author flourished, or since that time, have done, giving way to no nice exceptions so long as the substance of the matter were sufficiently shewed," &c.<sup>3</sup> It is evident that the period to which Lord Coke referred, in the passage cited by the commissioners, was that fully described by Blackstone,<sup>4</sup> when even the most trivial clerical errors were held

<sup>1</sup> Co. Litt., 303 a ; cited in Hall's *Pract. Act*, 1851, pp. 144, 145.

<sup>2</sup> Id., 804 b.

<sup>3</sup> Id.

<sup>4</sup> 3 Bl. Comm., 408 *et seq.*

beyond the reach of amendment, and the cause of reversal on motion in arrest of the judgment. Various statutes were passed to remedy this state of things,<sup>1</sup> which had been produced, not by the system of pleading, but by the timidity of the judges, who, frightened by Hengham's case, "refused to amend the most palpable errors and mis-entries unless by authority of Parliament."<sup>2</sup>

Lastly, we would suggest that the present tendency to popularize legal remedies at the expense of systematic procedure loses sight of one very material fact. Of all the causes of action that arise in the community, but a fraction are brought even for legal advice, still fewer are put in suit, and only a portion of these actually come to trial. The great bulk of questions are determined by the authority of existing precedents. But to do this with any thing like certainty requires that the precise point settled by the precedent should be intelligible; and this can only be the case where a distinct issue has been raised, and passed upon. The value of a precedent is wholly gone if the rule established by it is not based on clearly stated and relevant facts. If, therefore, a variety of issues, and those imperfectly defined, are presented in one cause, while individual justice may be attained, the value of the system is impaired, if not wholly lost. How largely this is the case under our present practice we can safely leave to the experience of the bar to-day.

JOSEPH WILLARD.

<sup>1</sup> 14 Edw. III., St. 1, c. 6; 9 Hen. V., St. 1, c. 4; 4 Hen. VI., c. 3; 8 Hen. VI., c. 12; id., c. 15.

<sup>2</sup> Blackstone, *ubi supra*.



## DIGEST OF THE ENGLISH LAW REPORTS FOR MAY, JUNE, AND JULY, 1876.

ACCOUNT. — See EVIDENCE; PARTNERSHIP; SOLICITOR AND CLIENT.

ACTION. — See EVIDENCE; HUSBAND AND WIFE.

AGENCY. — See BILLS AND NOTES; LIEN, 2; NEGLIGENCE, 2.

AGREEMENT. — See CONTRACT.

ALTERATION OF CONTRACT. — See CONTRACT.

ALTERATION OF INSTRUMENTS. — See CHECK.

ANSWER. — See PLEADING.

APPROPRIATION OF PAYMENTS. — See BILLS AND NOTES.

ASSAULT. — See HUSBAND AND WIFE.

AVERAGE. — See LIEN, 2.

BANK. — See CHECK.

### BANKRUPTCY.

1. The Divorce Court ordered M. to pay £5,000 to O. on the latter's undertaking to pay the same into the registry, to abide the further order of the court. M. did not pay the money, and O. filed a petition for adjudication in bankruptcy against M. *Held*, that there was no good petitioning creditor's debt. — *Ex parte Muirhead. In re Muirhead*, 2 Ch. D. 22.

2. Action for breach of an agreement, whereby the defendants agreed, in consideration of the plaintiff transferring and disclosing to them all his property upon trust for all the plaintiff's creditors, to repay to the plaintiff £50 upon realization of the plaintiff's property. *Held*, that said agreement was void, being a fraud upon the plaintiff's creditors. — *Blacklock v. Dobie*, 1 C. P. D. 265.

8. A partner in a firm died; and by the partnership articles, his share was to be paid out by instalments extending over a period of fourteen years. Before they were paid, the firm became bankrupt. *Held*, that the amount due the estate of the deceased partner could not be proved in bankruptcy against the firm. — *Nanson v. Gordon*, 1 App. Cas. 195.

See FRAUDULENT TRANSFER; SURETY.

BEQUEST. — See CY-PRÈS; DEVISE; ELECTION; LEGACY; MARRIAGE,  
RESTRAINT OF.

### BILL IN EQUITY.

A bill of discovery to obtain inspection of documents in the defendant's possession cannot be maintained in England if in aid of proceedings about to be taken for the recovery of land in India. — *Reiner v. Marquis of Salisbury*, 2 Ch. D. 878.

BILL OF LADING. — See BILLS AND NOTES.

## BILLS AND NOTES.

A. in England employed B. in South America to purchase goods for him. The course of business was as follows: B. raised funds to purchase goods by drawing bills on A. and selling them; B. with the proceeds purchased goods and shipped them to Liverpool, and sent the bills of lading and invoices of the goods by post direct to A.; in his accounts, B. credited A. with the bills, and charged him with the cost of the goods and with commission; and in his letters he directed A. to place the price of the goods to his credit, and the bills to his debit. Both A. and B. became bankrupt. At the time A. became bankrupt, goods were in transit to Liverpool; and some of the bills out of the proceeds of which the goods had been bought had been accepted, and others were presented to A. after his bankruptcy and not accepted. The goods arrived, and were taken possession of by A.'s trustee in bankruptcy. The holders of the bills claimed to have the proceeds of the goods appropriated to the payment of the accepted and also of the unaccepted bills. *Held*, that holders of the bills had no right to have the proceeds of said goods specifically appropriated to their bills. The property in the goods passed to A., subject to B.'s right of stoppage *in transitu*; it did not revert in B. on A.'s failure to accept some of said bills; and there was no evidence of an agreement by virtue of which B. had a charge upon the goods in the hands of A., and a right to have them applied in taking up the bills. — *Ex parte Banner. In re Tappenbeck*, 2 Ch. D. 278.

See BOND; CHECK.

## BOND.

A New York company sold its bonds there, and parted with its interest in them, and control over them. The bonds on which the name of the payee was left blank were then sent to England, and there advertised and sold by the New York purchaser's agents. *Held*, that the bonds were "issued" in England. — *Grenfell v. Commissioners of Inland Revenue*, 1 Ex. D. 242.

See SURETY.

CANON LAW. — See CHURCH OF ENGLAND.

## CARRIER.

By statute, a common carrier is not liable for injury to pictures which shall have been delivered either to be carried for hire, or to accompany the person of any passenger, when the value of the pictures exceeds £10, unless the pictures are declared and an increased charge paid. It was *held* that common carriers are protected by this statute, although the injury occurred after the pictures had been negligently taken by them beyond the point of destination. — *Morritt v. North-eastern Railway Co.*, 1 Q. B. D. 302.

See SHIP.

CHARITY. — See CY-PRÈS.

## CHARTERPARTY.

1. By charterparty a vessel was to carry a cargo of lumber from P. to M., "sixteen days to be allowed for loading at P., and to be discharged at such wharf or dock as the charterers may direct, always afloat in fourteen like days,

and ten days on demurrage over and above the said lying days, at £10 per day." The ship duly began unloading at M. It was the duty of the master to put the timber over the ship and form it into rafts, and the charterer was to take it away. Bad weather came on, and the rafts could not be formed; and the charterer consequently could not take the timber away. The bad weather caused a delay of four days in discharging the ship; and the ship-owner brought this action against the charterer for four days' demurrage. *Held*, that the defendant was liable, as there was an implied contract that he would take the risk of any ordinary vicissitudes which might prevent his releasing the ship at the expiration of the lay days. — *Thiis v. Byers*, 1 Q. B. D. 244.

2. To an action against charterers for delay in loading the vessel, the defendants set up this clause in the charterparty: "This charter being concluded by the said charterers for or on behalf of another party, it is agreed that all liability of the former shall cease as soon as the cargo is shipped, loading excepted; the owners and master of the vessel agreeing to rest solely on their lien on the cargo for freight, demurrage, and all other claims, and which lien it is hereby agreed they shall have." *Held*, that "loading excepted" extended to delay in loading, and that the defendants were therefore liable. — *Lister v. Van Haansbergen*, 1 Q. B. D. 269.

See INSURANCE, 2; MERCHANT SHIPPING ACT.

#### CHECK.

The defendant drew a check, payable to B. or bearer; and B. handed it to his clerk for deposit. The clerk absconded with it, and after altering its date from March 2, 1875, to March 26, 1875, passed it to the plaintiff for value. The plaintiff was not guilty of negligence. Payment of the check was stopped. *Held*, that the alteration was material, and that the check was void in the hands of the plaintiff. — *Vance v. Lowther*, 1 Ex. D. 176.

#### CHURCH OF ENGLAND.

1. A Wesleyan minister who had inscribed upon the tombstone of his daughter, who was buried in an English churchyard, the words "daughter of the Rev. H. K., Wesleyan Minister," was held entitled to use the word "Reverend" before his name, as it was not a title of honor or dignity belonging exclusively to the Established Church of England. — *Keet v. Smith*, 1 P. D. 73.

2. The Rubric of the Book of Common Prayer prefixed to the Communion Service, and the 27th canon in the canons of 1603, warrant a minister of his own authority, and without any trial, in repelling a parishioner from the Holy Communion in case he is "an open and notorious evil liver," who thereby gives offence to the congregation, or "a common and notorious depraver of the Book of Common Prayer." "Evil liver" in the Rubric, according to the natural use of the words, is limited to moral conduct. The appellant printed and published a volume entitled "Selections from the Old and New Testaments," and omitted therefrom all reference to the Devil or evil spirits. At the suggestion of the vicar of his parish, the appellant wrote him a letter concerning the book, in which he said, "With regard to my book, the parts which I have omitted are, in their present generally received sense, quite incompatible with religion or decency (in my opinion). How such ideas

have become connected with a book containing every thing that is necessary for a man to know, I really cannot say, and can only sincerely regret it." *Held*, that the appellant was neither an open and notorious evil liver, nor a depraver of the Book of Common Prayer. — *Jenkins v. Cook*, 1 P. D. 80; s. c. L. R. 4 Ad. and Ec. 468; 10 Am. Law Rev. 688.

CLASS. — See DEVISE, 2.

#### COLLISION.

A steamer ran into the barge A. in endeavoring to avoid collision with the barge S., which had brought herself across the bow of the steamer by improper steering. The A. instituted a cause of damage against the S. *Held*, that the S. was liable. That the A. might, by different steering after the steamer had changed her course to avoid the S., have avoided collision, did not make her necessarily guilty of negligence. — *The Sisters*, 1 P. D. 117.

See LEX FORI.

COMMON CARRIER. — See CARRIER; SHIP.

COMMON COUNTS. — See FRAUDS, STATUTE OF.

COMPANIES ACT. — See COMPANY, 1.

#### COMPANY.

1. The vendor of a mine agreed privately with M., who was negotiating for the purchase on behalf of a company, to give him 600 paid-up shares in the company. The sale was completed, and the vendor transferred to M. the 600 shares. *Held*, that M. held the shares as trustee for the company; and that under sect. 165 of the Companies Act the company was entitled to recover of M. the highest market-value to which the shares had attained since they were allotted to him. — *McKay's Case*, 2 Ch. D. 1.

2. The articles of association of a company provided that (7) the company should have a first and paramount lien upon all shares of any member for any moneys due to the company from him alone or jointly with any other person, with power to sell such shares and apply their proceeds in payment of such debts; and (16) that the company might decline to register any shares while the member making the transfer was, either alone or jointly with any other person, indebted to the company. S., who was the registered owner of certain shares, executed a transfer which the company declined to register, as they were holders of a bill of exchange accepted by S., but which had not arrived at maturity. *Held*, that the company must register the transfer, as they could only decline to register under art. 16 where they had a lien under art. 7, and that there was such a lien only when moneys were due and payable. — *In re Stockton Malleable Iron Co.*, 2 Ch. D. 101.

3. A company which had power to raise money by debentures secured by mortgage of all its property, issued debentures, which were nearly all taken up by the shareholders, secured by mortgage of all the property to which the company then was or thereafter should become entitled; the company to have the power to carry on its business and pay its debts until default in payment of interest or principal of the debentures. The company was ordered to be wound up. *Held*, that the debenture-holders were entitled to be paid in pri-

ority to the general creditors of the company. — *In re General South American Co.*, 2 Ch. D. 837.

4. The liability of shareholders in an insurance company was unlimited as to general creditors, but restricted as to policy-holders. The company borrowed money upon the security of certain calls upon its members. Before the debt was paid the company was wound up, and the debt was subsequently paid out of said calls. The policy-holders desired to have a sum equal to said debt repaid from the unlimited assets, so as to throw the payment upon the same, and not upon the limited assets. *Held*, that the policy-holders had no equity to have said debt thrown upon the unlimited assets. — *In re International Life Assurance Co.*, 2 Ch. D. 475.

5. H. sold sixty partly paid-up shares in a company to the defendants, who were stockholders, who gave the name of a transferee to whom the shares were transferred. The transferee was an infant; and upon the company being ordered to be wound up his name was taken from the register, and H.'s name placed upon the list of contributories for the sum of £5,400 due on said shares. H. brought a bill against the defendants, praying that they might be ordered to repay him all calls which he might be compelled to pay. After the defendants had put in an answer, H. agreed to pay the liquidator of the company £2,000, and transfer to him said shares; and he authorized him to use his name in all proceedings against the defendants, and retain any moneys received in the suit against the defendants, and apply the same in repaying to H. the £2,000, and in paying whatever was due from H. beyond the £2,000 paid by him to the liquidator; and the liquidator agreed to absolutely release H. from all liability on said shares, without any further payment. Subsequently the defendants admitted their original liability to H., but contended that the effect of the agreement between H. and the liquidator was to release them from any liability beyond the £2,000 paid by H. to the liquidator. *Held*, that the defendants were liable for the whole amount of the unpaid calls on said shares, which was £5,400. — *Heritage v. Paine*, 2 Ch. D. 594.

6. A company carrying on the business of iron-founders set aside, in accordance with their articles of association, a portion of its net profits for the purpose of "meeting contingencies, or of purchasing, improving, enlarging, rebuilding, restoring, reinstating, or maintaining the works, plant, or other premises or property, of the company." *Held*, that the sum set aside was not to be deducted from the net profits in determining the net profits of the year for the purposes of taxation. Such sum became capital. — *Forder v. Handyside*, 1 Ex. D. 283.

See NEGLIGENCE, 4; RAILWAY.

CONDITION. — See DISTRESS; LEASE, 1; LEGACY, 2; MARRIAGE, RESTRAINT OF.

CONFIRMATION OF SETTLEMENT. — See SETTLEMENT, 6.

CONSTRUCTION. — See CHARTERPARTY; COMPANY, 2; CONTRACT; DEVISE; ELECTION; LEGACY; RAILWAY; SALE; SETTLEMENT, 3, 5; SURETY.

CONTINGENT REMAINDER. — See DEVISE, 2.

## CONTRACT.

1. The defendant bought 100 tons of iron to be delivered at his works. Delivery, 25 tons at once, and 75 tons in July next. The first 25 tons were delivered immediately, and 50 tons more in July. On the 15th October the defendant met the plaintiffs' manager, and said, "You have not sent any pigs lately;" to which the manager replied, "I will send you a boat this week." The plaintiffs forwarded 25 tons addressed to the defendant, and the latter declined to receive the iron. To an action for non-acceptance of the iron pursuant to contract, the defendant pleaded that the plaintiffs were not ready and willing to deliver the iron according to contract. *Held*, that the defendant was not liable. It is laid down, that, where a vendor is shown to have withheld his order to deliver until after the agreed time in consequence of a verbal request of the *vendee* before the expiration of the agreed time, and where after such time the vendor proposes to deliver, and the *vendee* refuses to accept, the vendor can recover damages; but that, if the alteration of the period of delivery was made verbally at the request of the *vendor* before the period for delivery, the vendor could not show that he was willing and ready to deliver according to the original contract, and therefore could not recover. — *Plevins v. Downing*, 1 C. P. D. 220.

2. The plaintiff engaged to sing in an important part in a play which the defendants were about to bring out in their theatre. The first performance was to be Nov. 28; and on Nov. 23 the plaintiff was taken ill, so that it became evident that she could not perform the part on Nov. 28. Accordingly on Nov. 25 the defendants made a provisional arrangement with another person for a month, in case the plaintiff should be unable to sing on Nov. 28. The plaintiff was unable to sing until Dec. 4, on which day she offered to fill the part, but was refused. The court *held*, that if no substitute capable of performing said part could be obtained except upon the terms that she should be permanently engaged at higher pay than the plaintiff, then it followed as a matter of law that the failure on the plaintiff's part went to the root of the contract, and discharged the defendants; and that upon the facts the defendants were discharged. — *Poussard v. Spiers*, 1 Q. B. D. 410.

3. The defendant invited offers for the execution of the works comprised in certain specifications and plans for the purpose of building a bridge across a river. It was stated that "these plans are believed to be correct; but their accuracy is not guaranteed. The plaintiff agreed to complete the work in the manner described in the specifications, and do the work according to the terms of the specifications; and the agreement contained a condition, that if the mode of doing the work was altered (as it might be by the defendant's engineer) the plaintiff should do it in the altered way; and that if in consequence he incurred expense, he should have compensation, of the amount of which said engineer was to be sole judge. According to the specifications, the foundations of the piers were to be laid by means of caissons as shown in a drawing. The plaintiff attempted to lay the piers accordingly; but after much expense, it was found impracticable to do it in the above manner, and a new method was adopted by directions of the engineer. The plaintiff brought an action for breach of warranty that the bridge could be built according to said plans and specifications. *Held*, that there was no such warranty. *Quære*, whether the plain-

tiff could recover upon a *quantum meruit* for his extra work. — *Thorn v. Mayor of London*, 1 App. Cas. 121; s. c. L. R. 10 Ex. (Ex. Ch.) 112; 10 Am. Law Rev. 107.

4. A. and B., in consideration of the services and payments to be mutually rendered, agreed that B. should be A.'s sole agent at Liverpool for the sale of his coal during the term of seven years, and should not act as agent for any person other than A.; that rates should be fixed by A., and B. should receive a commission upon his sales; and that if B. should not have sold a certain amount, and A. supplied a certain amount per year, the agreement might be determined upon giving notice thereof. After four years, A. sold his coal-mine; and from that time B. ceased to be employed in the sale of the coal. *Held*, that there was no implied contract that A. would send any coal to Liverpool, or would continue for any particular length of time to send coal there; and that an action for breach of said agreement could not be maintained by B. — *Rhodes v. Forwood*, 1 App. Cas. 256.

See CHARTERPARTY; DAMAGES; FRAUDS, STATUTE OF; INSURANCE; LIEN, 2; NEGLIGENCE, 3; PARTNERSHIP; RAILWAY; SALE; TRUST, 2; VENDOR AND PURCHASER.

#### COVENANT.

The owner of houses numbered 38 and 40 on a street demised 40 to the plaintiff, who covenanted to repair the demised premises. Said owner had previously demised No. 38 in similar terms. Under 40 was an archway, the southerly side of which was formed by the northerly wall of house 38; and this side of the arch did not fall within the plaintiff's covenant to repair. Above the archway, the wall between 38 and 40 was used by both buildings; and this wall partially gave way, in consequence of the giving way of the wall under the archway. *Held*, that there was no implied covenant on the part of the defendant to maintain the wall under the archway, so as to support the plaintiff's premises. — *Colebeck v. Girdlers Co.*, 1 Q. B. D. 234.

See LEASE, 1; SETTLEMENT, 5.

#### CY-PRÈS.

The doctrine of *cy-près* disposition of charitable legacies is not necessarily inapplicable where the residuary bequest is to charity. For a discussion of the applicability of the doctrine of *cy-près*, see *Mayor of Lyons v. Advocate-General of Bengal*, 1 App. Cas. 92.

#### DAMAGES.

1. The plaintiff, who was in the habit of exhibiting his goods at cattle-shows, exhibited them at B. There he contracted with the defendants for the carriage of the goods to N., where there was to be another show, delivery to be before a certain day. The goods did not arrive until after said day, and when the show was over. The defendants paid the plaintiff's pecuniary travelling-expenses; but the plaintiff demanded compensation for loss of time and profits. It was found that the defendants had notice of the purpose for which the goods were sent. *Held*, that the plaintiff was entitled to damages for loss of profits, as such loss was the natural consequence of the failure of the object for which the goods were sent. — *Simpson v. London & North-western Railway Co.*, 1 Q. B. D. 274.

2. The defendant made his living by collecting messages, and transmitting them by telegraph to America and other places. He received from the plaintiffs a message in words by themselves unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving orders for certain goods. The defendant negligently omitted to send the message; and the plaintiffs, in consequence, lost large profits which they would have made by the transaction. The plaintiffs claimed damages to the amount of such profits. *Held*, that the plaintiffs were only entitled to nominal damages. — *Sanders v. Stuart*, 1 C. P. D. 326.

See NEGLIGENCE, 2, 8.

DEATH BY DROWNING. — See SETTLEMENT, 2.

DEBENTURE. — See BOND; COMPANY, 3.

DECLARATION OF TRUST. — See TRUST, 1.

#### DETINUE.

Detinue for a policy of insurance, with a count in trover by an administratrix of R. R. had effected insurance upon his life, and had given the policy to the defendant. No notice was given to the insurance company, and no assignment was executed. *Held*, that although the administratrix might not be able to recover the insurance-money without the policy, nor the defendant with the policy, yet as there had been a valid gift of the policy, the administratrix could not maintain the action. — *Rummen v. Hare*, 1 Ex. D. 169.

DEVIL, THE. — See CHURCH OF ENGLAND, 2.

#### DEVISE.

1. A testator gave the residue of his property to trustees in trust to divide the income equally amongst his three children during their respective lives; and after the decease of each of said children, to hold the share of which such child should be entitled to the income, in trust for his, her, or their issue. In case any of said children should die without leaving issue, the trustees were to hold the share to which such child should be entitled during life, as well originally as by survivorship or accruer, in trust for the survivor or survivors of said children during their, his, or her respective life or lives, and in equal shares if more than one; and after the decease of each of such survivors, the trustees were to hold the surviving or accruing share to which such survivor for the time being should become entitled for his or her life under the trusts aforesaid, in trust for his or her issue; and in case all said children should die without leaving issue, then in trust for the representatives of the survivor. The three children survived the testator. A child died without issue; then a child died leaving issue; and finally the third child died without issue. It was urged, that, as the third child died without issue, there was, on her death, intestacy as to one-half the said residuary estate. *Held*, that the issue of the second child were entitled to the whole of said residuary estate. — *Wake v. Varah*, 2 Ch. D. 348.

2. Devise to N. for life, remainder on events which happened, to the child or children of G., who, either before or after G.'s death, should attain twenty-one, or die under that age, leaving issue living at his, her, or their death, in fee-



simple as tenants in common. At the death of N., two children of G. had attained twenty-one; and there were other children who attained twenty-one after N.'s death. *Held*, that said two children of G. were entitled to the whole estate. *Brackenbury v. Gibbons*, 2 Ch. D. 417.

3. A testator gave his property to a trustee in trust to pay the income to his wife for the support of her and of his children until the eldest child should attain twenty-five, or until his wife should marry again; and in case of her second marriage before any of his children should attain twenty-five, in trust to pay her £30 a year, and apply the residue of the income for the support of his children: and the trustee was to raise and pay a certain sum to each child on his attaining twenty-five, and then pay the proceeds of the residue of his estate to his wife for life, if then unmarried; but in case she should marry again, then to sell and invest so much of his estate as should produce £30 a year, and pay the same to his wife, and pay the residue equally between his children, and their issue and their heirs and assigns as tenants in common; and in case of the death of both of his children under twenty-five without leaving issue, in trust to pay the income of the whole estate to the wife for life, and after her death to hold one moiety of the estate to the use of said wife and her heirs, and the other moiety to the use of the trustee. The wife survived the testator, and died without having married again, and leaving the testator's two sons living, who attained twenty-five. *Held*, that the gifts over on the second marriage of the wife took place upon her death, and that the two sons took equitable estates tail according to the rule in *Wild's Case*, 6 Rep. 16 b. — *Underhill v. Roden*, 2 Ch. D. 494.

See ELECTION; LEGACY; MARRIAGE, RESTRAINT OF; VENDOR AND PURCHASER, 2.

DIRECTOR. — See COMPANY, 1.

DISCOVERY. — See BILL IN EQUITY.

#### DISTRESS.

The lessee of a farm covenanted not to remove hay and unthreshed corn, or to sell them off the premises, but to use them for the improvement of the land demised. The landlord distrained hay and unthreshed corn for rent arrear, and sold the same with condition that they should be consumed on the premises; and consequently the best price was not obtained. *Held*, that the landlord could not, under 2 Wm. & M. c. 5, legally impose such a condition when selling the distress. — *Hawkins v. Walrond*, 1 C. P. D. 280.

DIVORCE. — See HUSBAND AND WIFE; JURISDICTION; SETTLEMENT, 4.

#### DOCUMENTS, INSPECTION OF.

The court refused to make an order on the solicitor of a defendant for the production of documents belonging to the defendant.

See *Cashin v. Craddock*, 2 Ch. D. 140.

DOMICILE. — See JURISDICTION.

EASEMENT. — See COVENANT; PRESCRIPTION.

#### ELECTION.

A., upon the marriage of his daughter B., covenanted that he would give

her by will one-half of all the real and personal estate to which he should be entitled at the time of his death, after payment of his debts and legacies, which latter were not to exceed in value one-fourth of said estate. B. and her husband covenanted to settle any property so given to B. upon certain trusts under which the husband had an estate for life, and after his death B. had an estate for life, subject to which B. and her husband had a joint power of appointment among the children of the marriage. By his will, A., after giving a small annuity not amounting to one-fourth part of his estate in value, gave one moiety of his estate upon certain trusts under which B. had an estate for life, remainder to her husband for life or until he should become bankrupt, remainder as B. should appoint. The other moiety of his estate A. gave to a second daughter. B. contended that she was entitled by the settlement to three-eighths of A.'s entire estate, and by the will to one-half of what remained. *Held*, that the presumption that A. did not intend to give B. a double portion was not destroyed by the fact that the portion given by the will was slightly larger than that given by the settlement, or by the difference of the trusts in the will from those in the settlement; and that B. must elect between the provisions of the will and the settlement. — *Russell v. St. Aubyn*, 2 Ch. D. 398.

EMINENT DOMAIN. — See LEASE, 2.

EQUITY. — See BILL IN EQUITY; COMPANY, 4; SETTLEMENT, 1; TRADE-MARK.

ESTATE TAIL. — See DEVISE, 3; LUNATIC.

#### EVIDENCE.

In an action upon accounts stated, it appeared that N. wrote from Battersea to T.'s attorney in London, "I will call at your office in the early part of next week, and hope to make some satisfactory arrangement for the payment of T.'s claim, as I cannot possibly pay it down at once." *Held*, that the letter was evidence to show an account stated at London. — *Taylor v. Nicholls*, 1 C. P. D. 242.

See PRESCRIPTION; PRESUMPTION; WILL, 2.

EXECUTORS AND ADMINISTRATORS. — See DETINUE.

EXECUTORY DEVISE. — See DEVISE, 2.

FORFEITURE. — See LEASE.

FRAUD. — See CONTRACT, 2.

#### FRAUDS, STATUTE OF.

The plaintiff, who proposed to take a lease of the defendant's house, agreed to pay £75 toward certain alterations in the house, which it was agreed should be made. By consent of the defendant, the plaintiff had the house painted, gas-pipes laid, and other improvements made; and he also ordered gas-fittings, cornices, and blinds to be made for the house, and paid certain sums of money for work done and materials provided at the defendant's request for decorating a room and making the agreed alterations. There was no valid agreement for a lease signed by the defendant. The plaintiff was obliged to give up the house through the defendant's neglect to complete said alterations. The plain-

tiff declared on the common counts for work done and materials provided by him for the defendant, for money paid, and money due on accounts stated. An arbitrator gave a verdict for £51. *Held*, that the plaintiff was entitled to recover money spent on the improvement of the house. Judgment on verdict. — *Pulbrook v. Lawes*, 1 Q. B. D. 84.

See CONTRACT, 1; PLEADING.

#### FRAUDULENT TRANSFER.

A. delivered possession of goods, together with an inventory, to B., in pursuance of a transaction intended to prevent A.'s creditors from being paid in full, and inducing them to accept a composition. Subsequently B. executed a bill of sale of the goods to C. for the alleged purpose of securing a debt. C. knew of the prior transaction. A. failed to come to a settlement with his creditors, and demanded back his goods from B. and C., and brought an action against C. for detaining his goods. *Held*, that A. was entitled to the goods as the intended illegal transaction was not carried out, and that he was entitled to repudiate the transfer. — *Taylor v. Bowers*, 1 Q. B. D. 291.

FREIGHT. — See INSURANCE, 2.

GENERAL AVERAGE. — See LIEN, 2.

GIFT. — See DETINUE.

HIGHWAY. — See WAY.

#### HUSBAND AND WIFE.

Action for assault on the plaintiff by the defendant. The plaintiff was divorced from the defendant; but the assault was committed while they were husband and wife. *Held*, that the action could not be maintained, because when the parties were husband and wife they were one person, and the difficulty was not merely one of procedure removed by the divorce. — *Phillips v. Barnet*, 1 Q. B. D. 436.

See SETTLEMENT, 4.

IMPLIED COVENANT. — See COVENANT.

INFANT. — See SETTLEMENT, 6.

INJUNCTION. — See TRADE-MARK.

INSCRIPTION. — See CHURCH OF ENGLAND, 1.

INSPECTION OF DOCUMENTS. — See DOCUMENTS, INSPECTION OF.

#### INSURANCE.

1. A vessel was insured from "P. to N., and for fifteen days whilst there after arrival." The vessel arrived at N., discharged her cargo, and then moved to a different part of the harbor to complete her loading, and while there was damaged by a storm. The stamp on the policy was sufficient to cover both a voyage and a time policy. *Held*, that the policy was a voyage policy, with a time policy of fifteen days ingrafted upon it; and that the insurers were liable. — *Gambles v. Ocean Marine Insurance Co.*, 1 Ex. D. 141; s. c. 1 Ex. D. 8; 10 Am. Law Rev. 468.

2. A vessel was chartered to D. by a charterparty providing that freight should be paid on unloading and right delivery of cargo at the rate of 42s. per ton on the quantity delivered, and providing further that said freight was to be paid one-half cash on signing bills of lading, less four months' interest at bank rate, remainder on right delivery of the cargo. The owner insured his freight, and D. insured the cargo at its value increased by prepayment of freight. The vessel was wrecked, and half the cargo delivered. The owner claimed from his insurers the unpaid half of his freight. The insurers contended that D. was only bound to pay one-half the freight remaining unpaid, and that they therefore were only liable to that amount, being one-quarter of the whole freight. *Held*, that the insurers were liable for the whole unpaid freight. — *Allison v. Bristol Marine Insurance Co.*, 1 App. Cas. 209; s. c. L. R. 9 C. P. (Ex. Ch.) 559; 9 Am. Law Rev. 291.

See DETINUE.

INTEREST. — See TENANT FOR LIFE.

#### JURISDICTION.

A man and woman were married in the Island of Jersey; and nine years afterward the husband deserted his wife and went to the United States, where he committed adultery. After the desertion the wife resided in England. *Held*, that the courts in England had no jurisdiction over the husband in a suit for dissolution of marriage brought by the wife. — *Le Sueur v. Le Sueur*, 1 P. D. 139.

See BILL IN EQUITY.

#### LEASE.

1. The defendant leased certain premises to A. and B., subject to a proviso that (*inter alia*) if the tenants or either of them should become bankrupt or assign over the demised premises, or should not fulfil their covenants, the defendant might re-enter. A. and B. covenanted to keep the premises in repair. The defendant also covenanted that he would, at the expiration of said lease, in case said covenants on the tenants' part should have been duly performed, grant to said tenants, their executors and administrators, a fresh lease of the premises, provided said tenants or either of them gave him notice of the desire to take such fresh lease. A. assigned his interest in said lease, and became bankrupt. At the termination of said lease, B. notified the defendant of his desire for a fresh lease. The premises then required repairs to the extent of £13 10s. The defendant refused to grant a fresh lease. *Held*, that B. was not entitled to a fresh lease, because the defendant's covenant was to grant a lease to both A. and B., and not to B. only, and because, by failure to repair, a condition precedent had been broken. — *Finch v. Underwood*, 2 Ch. D. 310.

2. The owner of mineral under land upon which ran a railway leased the minerals to H. The company paid H. a certain sum in consideration of his not working the minerals. H. failed to pay rent, and surrendered his lease to said owner, who then sold the minerals to the defendant. The railway company filed a bill to restrain the defendant from working the minerals to their injury, and offered to pay the defendant the value of the minerals less the amount

paid to H. The company had a statute right to take land, &c., on making compensation. *It seems* that the company had a right to have the minerals unworked for fifteen years without making further compensation, as said lease was terminated by surrender and not by entry for breach of condition. Otherwise if there had been a forfeiture by entry. — *Great Western Railway Co. v. Smith*, 2 Ch. D. 235.

See COVENANT.

#### LEGACY.

1. A testatrix, after devising certain property, bequeathed to the plaintiffs "all my furniture, plate, linen, and other effects that may be in my possession at the time of my death." At the time of her death the testatrix was entitled, in addition to her freehold property, to furniture, plate, linen, wearing apparel, jewellery, sums in cash, and £130 in the savings bank. *Held*, that all said personal property passed by the bequest. — *Hodgson v. Jex*, 2 Ch. D. 122.

2. A testator gave each of his younger sons £1,000 each, "which I charge on my estate at A. hereinafter devised [to his eldest son]; but I direct that the same shall not be raiseable or paid to them respectively until my eldest son shall come into actual possession of the M. estate." The M. estate was settled upon F. for life, remainder to said eldest son for life, remainder to his issue in tail male. The eldest son died before F., and never came into actual possession of the M. estate. *Held*, that the legacies failed, and fell into the residuary estate. — *Taylor v. Lambert*, 2 Ch. D. 177.

3. A testator gave his sons H. and J. £16,000 upon trust to pay the interest of £8,000, part thereof, to his daughter Ann for life, remainder to her children; and to pay the interest of the remaining £8,000 to his daughter Sarah for life, "in the same manner in every respect, and subject to the same control," as he had before directed as to his daughter Ann. He then gave £6,000 in trust for his son Samuel for life, remainder to his children, and empowered his trustees to apply the interest of all said sums for the maintenance and education of the children of said daughters and son. Sarah died leaving children. *Held*, that by implication Sarah's children were entitled to £8,000. — *Sweeting v. Prideaux*, 2 Ch. D. 413.

See CY-PRÈS; DEVISE; ELECTION; MARRIAGE, RESTRAINT OF.

#### LEX FORI.

A pier at Marbella in Spain, belonging to an English company, was injured by an English steamship. By the law of Spain in such cases the master and mariners of the ship, and not the ship or her owners, are liable in damages. The company instituted a cause of damage in England against the steamship. *Held*, that the law of Spain, and not that of England, governed the case. — *The M. Mozham*, 1 P. D. 107; s. c. 1 P. D. 43; 10 Am. Law Rev. 704.

LEX LOCI. — See LEX FORI.

#### LIEN.

1. W. was in the habit of sending goods to P.'s warehouse, where they were packed for shipment. W. became bankrupt while goods belonging to

him were at the warehouse of P., who claimed a lien upon them, not only for the charges for packing them, but for packing other goods of W., which P. had previously packed. *Held*, that P. had such a general lien. — *In re Witt. Ex parte Shubrook*, 2 Ch. D. 489.

2. The master of a vessel which had gone ashore with the cargo on board put the plaintiff on board as his agent to do what was for the benefit of all concerned. The plaintiff did work and expended money in discharging the cargo, which he brought to a place of safety, and took possession of. The vessel remained, and was sold as a wreck. The defendant, the holder of the bill of lading of the cargo, by S. his agent demanded the cargo, and S. verbally promised that the plaintiff should be paid his said expenses and his charges for said work; and thereupon the plaintiff delivered the cargo to S. S. had no special authority to make said promise. *Held*, (1) that the plaintiff had a lien for his said expenses and charges, which were in the nature of general average or salvage charges; and (2) that S. had implied authority to give security for any charges for which there was a lien on said cargo, and that the plaintiff's giving up his lien was a good consideration of the promise made by S. *Hingston v. Wendt*, 1 Q. B. D. 367.

See COMPANY, 2; SETTLEMENT, 3.

#### LUNATIC.

The committee of a lunatic tenant in tail of an estate subject to a charge for portions petitioned for leave to execute a disentailing deed for the purpose of raising the charge by a mortgage. The court refused to allow the entail to be barred further than was necessary, and ordered a mortgage for a term of years without power of sale. — *In re Pares*, 2 Ch. D. 61.

MARRIAGE. — See PRESUMPTION.

#### MARRIAGE, RESTRAINT OF.

A testator devised all his real estate to three women during their lifetime, and proceeded as follows: "And when any or some of the before-mentioned parties named, M. my sister, E. her daughter, or S. the daughter of the said D. J., shall depart this life, I give, devise, and bequeath her or their shares to be possessed and enjoyed by my sister J., together with her daughter Mary, during their lifetime; *provided* the said Mary, daughter of my sister, shall remain in her present state of single woman; otherwise, if she shall alter her present state of single woman, and bind herself in wedlock, she is liable to lose her share of the said property immediately, and her share to be possessed and enjoyed by the other mentioned parties, share and share alike. Mary married. *Held*, that Mary's estate ceased upon her marriage. It seems that the rule that conditions in restraint of marriage are invalid does not extend to devises of land. The court considered that the testator's object was only to provide for her while unmarried, and not to restrain her marriage. — *Jones v. Jones*, 1 Q. B. D. 279.

MARRIAGE SETTLEMENT. — See SETTLEMENT.

MARSHALLING ASSETS. — See COMPANY, 4.

MASTER AND SERVANT. — See NEGLIGENCE, 5.

## MERCHANT SHIPPING ACT.

The owner of a vessel who chartered it to another person and parted with all control of it for a certain period was held not be the owner of the vessel within sect. 169 of the Merchant Shipping Act, 1854. — *Meiklereid v. West*, 1 Q. B. D. 428.

MINES. — See LEASE, 2.

MINORITY. — See SETTLEMENT, 6.

MORTGAGE. — See COMPANY, 3; LUNATIC; SOLICITOR AND CLIENT; TRESPASS.

## NEGLECTANCE.

1. The plaintiff sent a heifer to the P. station on the defendants' railway. On the arrival of the car containing the heifer, it had to be shunted on to a siding; and as there were only one or two porters to shunt the car, the plaintiff assisted in the shunting. While so doing, the plaintiff was injured by a train through the negligence of the defendants' servants. *Held*, that the defendants were liable, as the plaintiff assisted in the shunting with consent of the defendants, and was not a mere volunteer. — *Wright v. London & North Western Railway Co.*, 1 Q. B. D. 252; s. c. L. R. 10 Q. B. 298; 10 Am. Law Rev. 296.

2. A. and B. owned adjacent houses, and A. was entitled to the support of B.'s soil for his house. B. employed R. to pull down and rebuild his house by a contract, under which R. agreed to take upon himself the risk and responsibility of shoring and supporting, so far as might be necessary, the adjoining buildings affected by the alteration during the progress of the works, and to make good any damage which might be sustained by said buildings during the progress or in consequence of the said works, and to satisfy any claims for compensation arising therefrom. A.'s house was injured by said works in consequence of R.'s not properly underpinning A.'s walls. *Held*, that B. was liable for said injuries. — *Bower v. Peate*, 1 Q. B. D. 821.

3. The tenant of a house, knowing that a lamp suspended from an iron bracket in front of the house was of some age, employed an experienced gas-fitter to examine it and put it in thorough repair. Subsequently a servant raised a ladder against the bracket, which he mounted for the purpose of cleaning the lamp. The ladder slipped, and the servant caught hold of the bracket, and thereby shook the lamp, which fell upon the plaintiff. On examination it appeared that the breakage of the lamp fastenings was caused by their general decay. The plaintiff brought an action against the tenant. *Held*, that the tenant was liable for the plaintiff's injuries. That the tenant had employed an independent contractor to repair the lamp was no excuse for his failure to perform his duty to keep the lamp in repair. — *Tarry v. Ashton*, 1 Q. B. D. 814.

4. The defendant railway was obliged by statute to carry all carriages, &c., upon its lines, upon payment of certain tolls; and in fact received between twenty thousand and thirty thousand foreign trucks weekly. One G. hired trucks from a wagon company which was to keep the trucks in repair. One of these trucks arrived at Peterborough on the defendant's line, and was there examined by a person in the defendant's employ, and found to have a spring broken

and a part of the wood-work cracked. The wagon company put in a new spring without examining the truck, but did not repair the crack in the wood. The truck was then carried forward, and broke down owing to an old crack in the axle which had not been discovered, and the plaintiff was injured. The jury found that the defect in the axle would have been discoverable upon fit and careful examination; that it was not the duty of the defendant to examine the axle by scraping off the dirt, and so minutely examining it that the crack would have been seen; and that it was the defendant's duty to require from the wagon company some distinct assurance that the truck had been thoroughly examined and repaired. Verdict for defendant, with liberty to the plaintiff to move for a verdict for an agreed sum. *Held*, that the defendant was entitled to a verdict. — *Richardson v. Great Eastern Railway Co.*, 1 C. P. D. 342; s. c. L. R. 10 C. P. 486; 10 Am. Law Rev. 296.

5. Certain gates belonging to the defendants' gas-works were safe when open, but when half open were liable to fall. The plaintiff, a servant in the defendants' employ, passed through the open gates; but returning not long after, the gates were partly open, and in passing through them the plaintiff was injured. There was no evidence to show that any one had touched the gates in the mean time. Before the accident, the defendants' manager had notice of the unsafe condition of the gates, and he had promised to attend to the matter; and orders had been given to make a bar which would prevent the gates falling, but these orders had not been carried out. *Held*, that the defendants were not liable, as the plaintiff had not shown that the defendants undertook personally to superintend the works, or that the persons employed by the defendants were not proper and competent persons, or that the defendants had failed to furnish the persons employed with adequate materials and suitable resources for carrying on said works. — *Allen v. New Gas Company*, 1 Ex. D. 251.

See CARRIER; COLLISION.

NOTICE. — See DAMAGES, 1.

#### NUISANCE.

A chemical company, which had the right to drain from their premises through two separate drains into a sewer, discharged through one drain liquid impregnated with muriatic acid, and through the other liquid impregnated with sulphur; and the two liquids combined in the sewer and gave off sulphuretted hydrogen, which escaped into a street, and was injurious to the public health. *Held*, that the escape of the sulphuretted hydrogen was a nuisance, arising from the act of the company, within 18 & 19 Vict. c. 121. — *St. Helen's Chemical Co. v. Corporation of St. Helen's*, 1 Ex. D. 196.

OFFER. — See VENDOR AND PURCHASER, 1.

PACKER'S LIEN. — See LIEN, 1.

#### PARTNERSHIP.

A. borrowed £250 of B. in 1869, and signed the following agreement: "In consideration of the sum of £250 this day paid to me, I hereby undertake to execute a deed of copartnership to you for one-eighth share in the profits of the



O. Music Hall, to be drawn up under the Limited Partnership Act." Subsequently A. wrote to B. offering to repay the money on Sept. 1, 1872, and that proportion of the profits, if any, to which B. was entitled under said agreement. A. made a tender in accordance with said letter, which B. refused; and B. filed a bill against A., claiming to be a partner, and praying specific performance of said agreement and for an account. A. answered on Feb. 21, 1873, claiming that said money was advanced as a loan, and that in any event there was only a partnership at will, which was terminated by said letter. *Held*, that said agreement constituted A. and B. partners at will, and that the partnership was not terminated by A.'s letter, but was terminated by his answer to B.'s bill; and that B. was entitled to one-eighth share in the profits up to Feb. 21, 1873, and one-eighth of the value of the music hall at that date; and accounts were ordered. — *Syers v. Syers*, 1 App. Cas. 174.

PARTY-WALL. — See COVENANT.

#### PATENT.

The defendant, under contract with officers of the British government, furnished rifles according to a certain patent, at a certain price, the government supplying the stock and tube for the barrel of each piece. It was held that the contract was for the manufacture of the rifles; and that although the rifles were made by an independent contractor, the user of the patent method of manufacture was a user by the government, and that the defendant was not liable for infringement of patent. — *Dixon v. London Small Arms Co.*, 1 Q. B. D. 384.

#### PLEADING.

A defendant demurred to a bill in equity for specific performance of a contract, showing for cause of demurrer that there was no memorandum signed by him within the Statute of Frauds. The demurrer was overruled, the bill amended, and the case heard. The defendant did not by answer plead the Statute of Frauds. Specific performance was ordered, and the defendant appealed. *Held*, that the defendant might take said objection on appeal, although not set forth in his answer. — *Johnasson v. Bonhote*, 2 Ch. D. 298.

See FRAUDS, STATUTE OF.

POSSESSION, REDUCTION TO. — See SETTLEMENT, 2.

#### PRESCRIPTION.

The plaintiff and defendant held adjoining lands fronting on a creek communicating with the sea. To prevent the water at high tides from overflowing their lands, the proprietors of said lands and of other adjoining lands had maintained sea-walls time out of mind. Such walls gradually subsided, and it was necessary from time to time to raise them by placing fresh materials on the top. The defendant neglected to keep his wall at the proper level; and in consequence the water came over his wall, and flowed over his land on to the plaintiff's land. *Held*, that the evidence did not establish a prescriptive right in the plaintiff to have the wall on the defendant's land maintained at a height sufficient to keep the water from the plaintiff's land, and that the defendant was under no liability at common law to maintain such a wall. — *Hudson v. Tabor*, 1 Q. B. D. 225.

## PRESUMPTION.

A marriage took place in a chamber some yards from a church while the church was under repair. Divine services had several times been performed in the chamber. The man married again; and in a prosecution for bigamy it was *held* that it must be presumed that the building in which was the chamber was licensed, in accordance with the maxim, *Omnia presumuntur rite esse acta*; and that the presumption was stronger, as the clergyman who celebrated the marriage might by statute have been indicted for felony if he knowingly did so in an unlicensed place. — *Queen v. Cresswell*, 1 Q. B. D. 448.

PRINCIPAL AND AGENT. — See **BILLS AND NOTES**; **LIEN**, 2; **NEGLECT**, 2.

PROBATE. — See **WILL**, 1.

PROFITS. — See **DAMAGES**, 1.

PROPERTY. — See **SALE**.

## RAILWAY.

The plaintiff took a ticket at the defendants' station for S. via Leeds and York. The ticket had indorsed upon it the words, "Issued by the (defendant) company, subject to the company's regulations, and to the conditions of the time-tables of the respective companies over whose lines this ticket is available." The conditions referred to were the following: "The published time-bills of this company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations; it being understood that the trains shall not depart before the appointed time. Every attention will be paid to insure punctuality as far as it is practicable: but the directors give notice that they do not undertake that the trains shall start and arrive at the time specified in the bills; nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party." The train carrying the plaintiff arrived at Leeds at 5.27 P.M., being 27 minutes late, so that he lost the usually connecting train which left at 5.20 P.M. He therefore proceeded to York by the next train, which left Leeds at 5.55 P.M., and arrived at York at 7 P.M., where it stopped. The next train for S. did not leave York until 8 P.M., to arrive at S. at 10 P.M.; and the plaintiff therefore took a special train, and arrived at S. between 8.30 and 9 P.M. If the plaintiff's train had made its connection properly at Leeds, the plaintiff would have arrived at S. in the ordinary course at 7.30 P.M. The plaintiff had no business necessitating his arrival at S. at any particular time. The plaintiff brought this action to recover the cost of the special train. *Held*, that the defendants were not liable. — See the various reasons of the judges of the Court of Appeals in sup-

port of their opinions. — *Le Blanche v. London & North Western Railway Co.*, 1 C. P. D. 286.

See LEASE, 2; NEGLIGENCE, 1, 4.

RELEASE. — See COMPANY, 5.

REMAINDER-MAN. — See TENANT FOR LIFE.

RESTRAINT OF MARRIAGE. — See MARRIAGE, RESTRAINT OF.

REVERSIONARY INTEREST. — See SETTLEMENT, 5.

#### SALE.

1. C. agreed to sell H. 200 tons potatoes grown on C.'s land at W., to be delivered during September and October, and paid for as taken away. C. sowed land sufficient in an ordinary season to produce a much larger quantity than 200 tons; but a disease which C. could not have prevented attacked the crop and caused it to fail, so that only 80 tons were delivered to H. An action was brought by H. against C. for failure to deliver the residue of the 200 tons. *Held*, that the contract to deliver the potatoes of a particular kind and grown on a specific place was excused by the failure of the crop without C.'s fault. — *Howell v. Coupland*, 1 Q. B. D. 258; s. c. Law Rep. 9 Q. B. 462; 9 Am. Law Rev. 286.

2. One A. Blenkarn took premises at 37 W. Street, and ordered goods of the plaintiffs, signing his orders so as to look like A. Blenkiron & Co., which was the name of a well-known firm at 123 in said street. The goods were supplied, and Blenkarn sold them to the defendant, who sold them to others. The plaintiffs brought trover. *Held*, that as the plaintiffs intended to contract with the person carrying on business at 37 W. Street, although they mistakenly supposed him to be of the firm of Blenkiron & Co., the property in said goods passed to Blenkarn, and could not be divested from the defendant, who had acquired the goods *bona fide*. — *Lindsay v. Cundy*, 1 Q. B. D. 348.

3. The defendant contracted to purchase of the plaintiff 4,500 quarters oats: "Shipment by steamer or steamers during February next. Should ice at loading port prevent shipment within stipulated time, shipment to be made immediately after reopening of the navigation." The plaintiff shipped 1,139 quarters which arrived in time, but were not accepted by the defendant, and the remainder by another vessel which did not arrive in time. *Held*, that the defendant was bound to accept said oats which arrived in time. — *Brandt v. Lawrence*, 1 Q. B. D. 344.

See CONTRACT, 1; DISTRESS; FRAUDULENT TRANSFER; VENDOR AND PURCHASER, 1, 3.

#### SALVAGE.

Towage services may be described as the employment of one vessel to expedite the voyage of another; when nothing more is required than the accelerating her progress. . . . If the vessel was in a state of danger at that time, and he (the captain of vessel rendering the services) had towed her, he would be entitled to be considered as a salvor. . . . It is not necessary that the distress should be actual or immediate, or that the danger should be imminent and absolute. Sir Robert Phillimore (adopting the language of Dr. Lushington) in *The Strathnaver*, 1 App. Cas. 58.

See LIEN, 2.

SEA-WALL. — See PRESCRIPTION.

SEAWORTHINESS. — See SHIP.

SECURITY. — See BOND.

#### SETTLEMENT.

1. Ante-nuptial articles were signed, providing that the wife's personal property should, after the marriage, be transferred to trustees upon trust for the husband and wife during their lives; "the trusts of the capital being for and amongst the children according to the appointment of said husband and wife or the survivor of them, and in default of appointment, to the children equally; in the event of there being no children, and of the husband being the survivor, the trust property to be at his absolute disposal." After the marriage, a settlement was executed; but it contained no provision for the event of there being no child and the husband dying before the wife. The property was transferred to trustees; and the husband received the income for several years, and died with part of the income in arrear. There was one child of the marriage, who died an infant in the lifetime of both parents. The representative of the husband claimed the arrears of income, and the capital subject to the wife's estate. *Held*, that the capital and arrears of income belonged to the wife. The settlement was not in accordance with the ante-nuptial agreement, which would have been carried into effect by giving shares to the sons of the marriage contingent upon their attaining twenty-one, and to the daughters contingent on attaining twenty-one or marrying; or by contingent limitations over of the shares of sons dying under twenty-one, and of daughters attaining that age or marrying; in either of which cases, the husband would not have taken as representative of a child dying an infant and unmarried. — *Cogan v. Duffield*, 2 Ch. D. 44; s. c. L. R. 20 Eq. 789; 10 Am. Law Rev. 476.

2. In a marriage settlement, L. agreed that he would, after the marriage, transfer certain consols to trustees in trust for himself for life, and after his death for his intended wife for life, and after the death of the survivor in trust for the children; and if no children, then in trust for the survivor of the settlors and his or her executors, &c. G. assigned by the settlement certain bonds to the same trustees upon trust to pay the income to L. during the joint lives of L. and G.; and if L. should survive G., then in trust after G.'s death to transfer the bonds to such persons as G. should by will appoint; and in default of appointment, to her next of kin; but if she survived L., then to transfer the bonds to G., her executors, &c. L. by will gave all his property to G., and G. by will gave her property to L. for life, remainder to her sisters. Both L. and G. were lost in the *Liberia*. It was contended that by the settlement the husband had reduced the wife's property into possession; and that there being no presumption of survivorship, the trusts of the settlement were exhausted, and that the husband's representative was entitled to the whole property. *Held*, that the funds settled by each settlor belonged to his or her respective legal representatives. — *Wollaston v. Berkeley*, 2 Ch. D. 213.

3. Previously to a marriage, the intended husband signed a memorandum agreeing to transfer certain stocks, then forming part of the intended wife's

property, into the names of the wife and her son by a former marriage, in trust for the wife; "neither party having power to dispose of said stocks without consent of both parties to such disposal." After the marriage the husband got possession of part of the stocks, and disposed of them. It was contended that there was a trust for the wife's separate use, and that she had the absolute power of disposing of the stocks. *Held*, that the husband must make good the amount of stocks disposed of by him, and that the wife and her son as trustees had a lien upon the remainder of the wife's property to make good said amount. — *Hastie v. Hastie*, 2 Ch. D. 804.

4. By marriage settlement, a wife's property was settled as to one moiety upon certain trusts for the wife, and as to the other moiety in trust for the husband and his heirs. The wife obtained a decree of divorce from her husband, and filed a bill for a declaration that she was entitled to the whole of the settled property, and that it might be conveyed to her. *Held*, that the husband's rights were not forfeited by the dissolution of marriage. — *Burton v. Sturgeon*, 2 Ch. D. 818.

5. Covenant in a marriage settlement that all the property to which the woman or the man in her right should during coverture become beneficially entitled in possession or reversion, or in any manner whatever, derivable from J., should be settled upon certain trusts. Before the marriage, the woman was entitled to the reversion in a fund subject to the life interest of a person who survived said woman. *Held*, that said reversionary interest was not subject to said covenant. — *In re Jones's Will*, 2 Ch. D. 862.

6. Upon the marriage of a man with a woman who was a minor, a settlement was made of property belonging to both. The husband died; and a suit was brought against the woman, then of age, in relation to property brought into said settlement by the husband. The suit was settled by consent of the wife, and a certain part of the property paid to her. Subsequently the woman married again; and a petition was filed by her and her second husband, praying, among other things, that certain funds of the wife should be carried over to the credit of an account entitled "The Settlement Account," made on the marriage of said woman with her first husband; and a decree was made accordingly. Afterward the woman and her husband filed a bill to have said settlement set aside; and they alleged that they did not know or intend that said petition might have the effect of confirming said settlement. *Held*, that the settlement had been confirmed by the acts of said woman and her second husband. — *White v. Cox*, 2 Ch. D. 887.

See TRUST, 2.

SHAREHOLDER. — See COMPANY.

#### SHIP.

The defendants received and shipped on board their vessel certain heavy armor-plates belonging to the plaintiff. On the voyage one of them broke loose, owing to the rolling of the vessel, and went through the side of the ship, which was in consequence lost, with all its cargo. At the trial the judge instructed the jury that a ship-owner warrants the fitness of his ship when she sails, and not merely that he will honestly and *bona fide* endeavor to make her fit; and he left it to the jury whether the vessel at the time of her sailing was

in a state, as regards the stowing and receiving of said plates, reasonably fit to encounter the ordinary perils that might be expected on said voyage; and whether, if she was not in a fit state, the loss was caused by that unfitness. *Held*, that a ship-owner warrants as above stated, although not a common carrier; and that said directions were correct. — *Kopitoff v. Wilson*, 1 Q. B. D. 377.

See CHARTERPARTY; COLLISION; INSURANCE, 2; LEX FORI; LIEN, 2; SALVAGE.

#### SOLICITOR AND CLIENT.

A solicitor refused to lend money to his client except on mortgage containing stipulations that he might charge a commission upon rents received by him as mortgagee in possession, and that arrears of interest should be deemed a part of the principal debt. In ordering an account, the court disregarded these stipulations. — *Eyre v. Hughes*, 2 Ch. D. 148.

SPECIAL DAMAGE. — See DAMAGES, 1.

SPECIFIC PERFORMANCE. — See VENDOR AND PURCHASER, 8.

STATUTE. — See CARRIER; COMPANY, 1; DISTRESS; MERCHANT SHIPPING ACT; NUISANCE; TRUST, 1.

STATUTE OF FRAUDS. — See CONTRACT, 1; FRAUDS, STATUTE OF; PLEADING.

STOCK DIVIDEND. — See COMPANY, 6.

STOPPAGE IN TRANSIT. — See BILLS AND NOTES.

#### SURETY.

Action on a joint and several bond given by a debtor and the defendant and others for £14,000 to secure a debt of £7,000, and conditioned to be void if the obligors, or either of them, should in satisfaction of the £7,000 pay £7,000, provided that the defendant should not be liable under the bond for a sum or sums exceeding altogether in debt or damages £1,300. The debtor paid £1,000, went into bankruptcy, and paid 9s. 2d. in the pound, leaving more than £1,300 unpaid on said debt. The defendant contended that he was entitled to deduct a 9s. 2d. in the pound from the £1,300. *Held*, that the defendant guaranteed the whole £7,000, although only liable for £1,300, and was not entitled to deduct a ratable proportion of the dividend, but was liable for £1,300. — *Ellis v. Emmanuel*, 1 Ex. D. 157.

SURRENDER. — See LEASE, 2.

TAX. — See COMPANY, 6.

TELEGRAPHIC MESSAGE. — See DAMAGES, 2.

#### TENANT FOR LIFE.

A testator directed that his real estate should be sold, and the proceeds applied in aid of his personal estate; but more than a year elapsed before the sale took place. The personal estate was insufficient to pay debts; but after they were paid, a surplus of the proceeds of the real estate remained. *Held*, that, as between tenant for life and remainder-man, all interest that had accrued

during the first year after the testator's death and subsequently must be paid by the tenant for life. — *Marshall v. Crowther*, 2 Ch. D. 199.

See TRESPASS.

THEATRICAL ENGAGEMENT. — See CONTRACT, 2.

TITLE. — See VENDOR AND PURCHASER, 2.

TITLE OF HONOR. — See CHURCH OF ENGLAND, 1.

TOWAGE. — See SALVAGE.

#### TRADE-MARK.

The defendant W. advertised and sent out trade circulars to this effect: "W.'s patent *Singer* Sewing Machine. — W.'s sewing machines are the only patented machines of this class. W.'s machines have special improvements over any other make, English or American, of this machine. Buy no machine until you have inspected W.'s patent *Singer*." The *Singer* Manufacturing Company, the plaintiffs, had its trade-mark, and W. had his own unlike the plaintiff's; and W. did not attach the word "*Singer*" to any part of his machine. An injunction to restrain W. from advertising as aforesaid was refused, as he was neither using the plaintiff's trade-mark, nor representing that his machines were made by the plaintiff. — *Singer Manufacturing Co. v. Wilson*, 2 Ch. D. 485.

#### TRESPASS.

The mortgagee of a life tenancy, in possession under an order of court, was held not to be a trespasser upon the death of the tenant for life. — *Hickman v. Upsall*, 2 Ch. D. 617.

See WAY.

TROVER. — See SALE, 2.

#### TRUST.

1. A solicitor, who had received money from E. for investment, executed a declaration of trust of certain personal property for the benefit of E., but without her knowledge. About a fortnight later, the solicitor died insolvent. Whether he knew of his insolvency did not appear. *Held*, that E. was entitled to the personal property, as the gift was *bona fide* and valid within 18 Eliz. c. 5. — *Middleton v. Pollock*. *Ex parte Elliott*, 2 Ch. D. 104.

2. Trustees who held real estate for a term of a thousand years were empowered during certain lives and twenty-one years from the testator's death, and after payment of certain charges, to keep certain buildings in repair, and to erect any new or additional buildings, and generally to make such outlay for the improvement or amelioration of the estate as the trustees should think fit or conducive to the general benefit of the estate or the tenants. The income was insufficient to more than pay said charges. The court allowed the trustees to repay from the principal certain sums expended for new buildings and drainage upon which the tenants paid five per cent interest. — *In re Leslie's Settlement Trusts*, 2 Ch. D. 185.

3. Personal property was settled in trust for the wife of H. for life, remainder in trust for H. for life, remainder to the children of H. and his wife;

and the trustees had power to invest in real estate, and to allow H. and his wife to occupy an estate so purchased. Certain real estate was devised to H. in trust for sale, and to hold one-third of the proceeds upon the above-mentioned trusts. This real estate was put up for sale; and H. requested the trustees of the personal estate to purchase a portion of it upon which H. and his wife desired to reside. The trustees consented, and left the purchase in the hands of H. H. then requested B. to act as agent of the trustees in purchasing; and H. subsequently went to C., and requested him to fix the reserve price of said portion of the land. C. fixed the reserve price at £6,000. H. then requested B. to bid up to £8,000 for the land, and at the sale B. bought the land for £7,280. As the trustees had not enough money, a part of the purchase-money was supplied by H., who acted with good faith throughout the transaction. Certain *cestuis que trust* of the land brought a bill alleging that to the extent of the moneys supplied by him H. was a purchaser from himself of the trust-property, and praying for a resale at a price not less than said purchase price, the surplus, if any, to be invested for the purposes of the trust; but if no surplus, then the trustees to be held to said purchase. *Held*, that said purchase was proper, and that the money contributed by H. must be held to have been added by him to the trust-funds held by said trustees. — *Hickley v. Hickley*, 2 Ch. D. 190.

See COMPANY, 1; SETTLEMENT, 3; VENDOR AND PURCHASER, 2, 3.

#### VENDOR AND PURCHASER.

1. The defendant, on June 10, signed a memorandum, whereby he agreed to sell a piece of land to the plaintiff for a certain sum. "P. S. — This offer to be left over until June 12." The postscript was signed by the defendant. On June 11 the defendant sold the land to a third party; and after this the plaintiff, who knew of the sale, offered to take the land according to said agreement. *Held*, that the defendant had made only an offer to the plaintiff, and might at any time withdraw it verbally, or by a sale brought to the knowledge of the plaintiff. — *Dickinson v. Dodds*, 2 Ch. D. 463.

2. A. agreed to purchase and E. agreed to sell certain real estate called Bury; but before any conveyance was executed, E. died. By his will E. devised all his real estate to H. and M., and all his real estate which might at his death be vested in him as trustee to M. alone. *Held*, that the Bury estate passed to M., and that the concurrence of the testator's heir-at-law in a conveyance was not necessary in order to give A. a complete title. — *Lysaght v. Edwards*, 2 Ch. D. 499.

3. A trustee of real estate who had power to sell, leased the property for thirty years by deed, to which the beneficiaries were parties. The lessee underlet the premises; and subsequently, while the lease was still running, the trustee determined to sell the property, and by arrangement with the lessee it was put up in one lot, and not as a reversion and leasehold interest separately. The particulars of sale, after disclosing all the facts in detail, stated that the lessee would concur in the sale, so that the property would be sold subject to the underleases only. The defendant agreed to purchase the estate at a certain price, and the trustee agreed with the lessee that the latter should have a certain portion of the purchase-money. The defendant refused to complete



the purchase upon the ground that the value of the lessee's interest had not been determined *before* the sale, so that the burden was thrown on the defendant of seeing that a proper proportion of the purchase-money was paid to the trustee; and he insisted that to settle this question he was entitled to the concurrence of the beneficiaries in the conveyance of the property to him. *Held*, that the trustee was entitled to a decree for specific performance of the defendant's agreement to purchase. — *Morris v. Debenham*, 2 Ch. D. 540.

VESTED INTEREST. — See DEVISE, 2.

WARRANTY. — See CONTRACT, 3; SHIP.

#### WAY.

In consequence of ways leading to the different ends of a highway being stopped up, access to either end of the highway ceased. *Held*, that the way ceased to be a highway. Coleridge, C. J.: "If the defendants had a right to be there [on the former highway], though they got there by an act of trespass, they would not be trespassers for being there." — *Bailey v. Jamieson*, 1 C. P. D. 329.

#### WILL.

1. W. B. Astor made two wills, the latter of which disposed of British funds only; and he directed that it should not affect his first will, which related to property in America. The first will was very long. Probate was granted in England of the second will only, with a note of reference to the authenticated copy of the first will filed in the registry. — *In the Goods of Astor*, 1 P. D. 150.

2. The contents of a lost will was allowed to be proved by secondary evidence; and probate was granted of the portion proved, although it was not the whole will. Declarations of the testator made both before and after the execution of his will were admitted. — *Sugden v. Lord St. Leonards*, 1 P. D. 154.

See CY-PRÈS; DEVISE; ELECTION; LEGACY; MARRIAGE, RESTRAINT OF; VENDOR AND PURCHASER, 2.

#### WORDS.

"*Children and their issue and their heirs.*" — See DEVISE, 3.

"*Depraver of the Book of Common Prayer.*" — See CHURCH OF ENGLAND, 2.

"*Due.*" — See COMPANY, 2.

"*Evil liver.*" — See CHURCH OF ENGLAND, 2.

"*Issued.*" — See BOND.

"*Owner.*" — See MERCHANT SHIPPING ACT.

"*Reverend.*" — See CHURCH OF ENGLAND, 1.

"*Survivor.*" — See DEVISE, 1.

WORK DONE. — See FRAUDS, STATUTE OF.

## SELECTED DIGEST OF STATE REPORTS.

[For the present number of the Digest, selections have been made from the following volumes of State Reports: 50 Alabama; 28 Arkansas; 26 Grattan (Virginia); 11 C. E. Green (New Jersey Equity); 69 Illinois; 50 and 51 Indiana; 14 Kansas; 42 Maryland; 118 Massachusetts; 32 Michigan; 21 Minnesota; 50 Mississippi; 60 Missouri; 4 Nebraska; 10 Nevada; 61 New York; 78 Pennsylvania State; 43 Texas; 7 West Virginia; 38 and 39 Wisconsin.]

**ABATEMENT.** — See **DIVORCE**, 2; **EXECUTOR**; **PARTIES**, 2; **TRIAL**, 3.

**ACTION.** — See **ASSUMPSIT**, 1, 2; **CONFLICT OF LAWS**, 2; **FRAUD**; **MARRIED WOMAN**; **NEGLIGENCE**, 2; **PARTIES**; **SLAVE**.

**ADJOURNMENT.** — See **STATUTE**, 1.

**ADMISSION.** — See **EVIDENCE**, 2.

**ADVERSE POSSESSION.**

A void deed purported to convey three-fourths of a township containing in all about 19,000 acres. The grantee named in the deed entered upon and improved about 400 acres in the south-east corner of the township, and afterwards brought ejectment for 4,000 acres lying along the northern boundary of the township. *Held*, that he had no possession which would support his action, even against a mere trespasser. — *Thompson v. Burhans*, 61 N. Y. 52.

**ADVERTISEMENT.** — See **CARRIER**, 1.

**AFFIDAVIT.**

An affidavit required by law was duly written out, and had appended to it the certificate of the proper officer that it had been sworn to, but was not signed by the person swearing. *Held* sufficient. — *Brooks v. Sneed*, 50 Miss. 416.

**AGENT.**

A power of attorney authorized the attorney to sell the land of the principal, and to make all necessary deeds of conveyance, to pay taxes, make leases, appear in suits, submit to arbitration any matter respecting the estate, and generally to do any acts in relation to the estate which the interest of the principal required. *Held*, that the attorney might convey the estate by deed with covenant against incumbrances, and that the principal was bound by such covenant. — *Bronson v. Coffin*, 118 Mass. 156.

See **ATTORNEY**, 1, 2; **BILLS AND NOTES**, 2; **GUARANTY**; **PARTIES**, 1; **PARTNERSHIP**, 2.

**AIDER BY VERDICT.** — See **INDICTMENT**, 2, 3; **TRIAL**, 3.

**ALIMONY.**

Cross-suits for divorce. After decree in the husband's favor in both,

*held* that no order should be made on him for payment of the wife's counsel fees. — *Newman v. Newman*, 69 Ill. 167.

See HUSBAND AND WIFE, 2; MARRIED WOMAN.

ALLOCUTUS. — See TRIAL, 2.

#### AMENDMENT.

An agreement by a defendant to withdraw a plea of usury is against public policy, and the plaintiff cannot enforce it as a matter of right; but where a defendant, after so withdrawing his plea, in consideration that the plaintiff would assent to a continuance, afterwards prayed leave to amend by filing the same plea again, *held* that the court rightly refused to allow the amendment. — *Clark v. Spencer*, 14 Kan. 398.

See ATTORNEY, 1.

APPEAL. — See ESTOPPEL, 1; REMOVAL OF SUITS, 1, 3.

ARREST. — See MARRIAGE.

ASSAULT. — See INDICTMENT, 1.

#### ASSUMPSIT.

1. A county treasurer is the debtor, and not the bailee, of the county, in respect of the public moneys in his hands; and therefore if he improperly lends such moneys, and afterwards becomes a defaulter, the borrowers are not liable to the county in an action for money had and received. And *semble* that they are not liable in any form of action, except to the extent of such sums as cannot be recovered of the treasurer or the sureties on his official bond. — *Perley v. Muskegon County*, 32 Mich. 182.

2. Defendant sold land to plaintiff, and covenanted under seal to pay the taxes due on it, but failed to do so. *Held*, that plaintiff, having paid those taxes, might recover them of defendant as money paid to his use, and was not confined to his remedy on the covenant. — *Curtis v. Flint & Penn. Marquette Ry. Co.*, 32 Mich. 291.

3. Plaintiff agreed that he and his wife would work in defendant's service during a year for an entire sum. Four months after, the wife being about to be confined, left defendant's service, and plaintiff went with her. *Held*, that plaintiff's non-performance of his contract was not excused, being prevented by an event which he ought to have foreseen; and, therefore, that he could recover nothing on a *quantum meruit*. — *Jennings v. Lyons*, 39 Wis. 553.

See CONTRACT, 1.

#### ATTORNEY AND COUNSEL.

1. An attorney's authority ceases, unless renewed, with the entry of judgment against his client; and therefore, if the successful party afterwards moves to amend the judgment, he must serve notice of motion on the other party personally, and not on the attorney. — *Berthold v. Fox*, 21 Minn. 51.

2. For the same reason, where a defendant's goods are taken on execution, the attorney retained by him to defend the action has no authority to agree that the goods levied on shall be sold in a manner different from that provided by law. — *Kronschable v. Knoblanck*, *ib.* 56.

3. The Supreme Court of Wisconsin refused to admit a woman to practise at its bar. — *In re Goodell*, 39 Wis. 232.

4. The same court refused to admit to its bar a resident of another State, although he was a counsellor-at-law in good standing where he resided. — *In re Mosness*, 39 Wis. 509.

See AGENT; ALIMONY; CONTRACT, 1; JUDGE; MARRIED WOMAN.

AUTREFOIS ACQUIT. — See TRIAL, 1.

AVERAGE. — See INSURANCE (FIRE), 2.

BAILEMENT. — See ASSUMPSIT, 1; ESTOPPEL, 3.

BANK. — See NATIONAL BANK.

#### BANKRUPTCY.

Where, by statute, the stockholders of a corporation are liable for its debts only after judgment recovered against it, an action may be maintained against a corporation, as a step to charging its stockholders, even after it has been adjudged bankrupt, and the plaintiff has proved his claim in bankruptcy and received a dividend. — *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532.

See ESTOPPEL, 3; RES ADJUDICATA.

BASTARDY. — See EVIDENCE, 2.

#### BILLS AND NOTES.

1. The maker of a negotiable promissory note is liable on it to a *bona fide* holder, although he signed it relying on the representations of another person that it was a different instrument, if he might have known its nature by the exercise of ordinary care. — *Shirt v. Overjohn*, 60 Mo. 305.

2. Promissory notes were placed by the makers in the hands of J. S., to be delivered to the payees on the happening of a certain contingency; and J. S., without authority, delivered them to the payees without waiting for such contingency. Held, that the makers were not liable on them, even to *bona fide* holders for value. — *Chipman v. Tucker*, 38 Wis. 43. *Roberts v. McGrath*, ib. 52. *Roberts v. Wood*, ib. 60.

See CONSIDERATION; CONSTITUTIONAL LAW, 1; INDORSEMENT; LORD'S DAY; LUNATIC; PARTIES, 1; PARTNERSHIP, 3.

#### BONA FIDE PURCHASER.

Where the true owner of goods voluntarily delivers them to another person, being induced so to do by false pretences of the latter of such a character as amount to a felony by statute, a *bona fide* purchaser from the felon shall nevertheless take a good title as against the true owner. — *Cochran v. Stewart*, 21 Minn. 435.

See BILLS AND NOTES, 1, 2; LORD'S DAY; LUNATIC.

BY-LAW. — See CORPORATION, 2.

#### CARRIER.

1. By statute, if goods remain in the custody of a carrier more than ninety days after their arrival at the place of destination, he may advertise and sell them for non-payment of freight and charges, after thirty days' notice. Held, that a carrier might sell after ninety days, if he had in the mean time given

due notice ; and that he was not bound to wait ninety days before advertising at all. — *Western R.R. Co. v. Rembert*, 50 Ala. 25.

2. A carrier received goods from a bonded warehouse in one city, to be delivered at a bonded warehouse in another; which could not be done, as the carrier knew, without written notice to the revenue-officers. On arrival of the goods at the place of destination, the carrier failed to give such notice; and the goods were afterwards, while still in his custody, destroyed by fire without his fault. *Held*, that he was liable. — *Chicago & N. W. R.R. Co. v. Sawyer*, 69 Ill. 285.

3. Action against a common carrier for non-delivery of goods. Plea, that the goods had been taken out of his possession by virtue of a writ of replevin; which action was still pending. *Held* bad, for not showing that defendant gave notice to plaintiff, within a reasonable time, of the taking. — *Ohio & Mississippi Ry. Co. v. Yohe*, 51 Ind. 181.

4. A passenger on board an ocean-steamer, paying a lump sum for his transportation, board, and lodging, lost during the night a watch hung up in the pocket of his clothes by his bedside, which watch he carried on his person during the day. *Held*, that the owners of the steamer were not liable for the loss, either as innkeepers or carriers. — *Clark v. Burns*, 118 Mass. 275.

See NEGLIGENCE, 1.

CATTLE. — See CONSTITUTIONAL LAW, 3.

CHARITY. — See DEVISE, 3.

CHARTER. — See CONSTITUTIONAL LAW (STATE), 3.

CHOSE IN ACTION. — See CONFLICT OF LAWS, 2.

CHURCH. — See RELIGIOUS SOCIETY.

COMMON CARRIER. — See CARRIER.

#### CONDITION.

A grant was made by deed, for nominal consideration, of a parcel of land "only for dépôt and other railroad purposes," and of an adjoining parcel "for a railway, both of said parcels being granted solely for said road purposes." The grantees built their railway on the second parcel, but built their dépôt eighty rods from the first parcel, on the other side of a pond. *Held*, that each parcel was granted on a separate condition subsequent; that the condition as to the first parcel was broken, and that that parcel only was forfeited. — *Horner v. Chicago, Milwaukee, & St. Paul Ry. Co.*, 38 Wis. 165.

See ESTOPPEL, 2.

CONFLICT OF FEDERAL AND STATE AUTHORITY. — See JURISDICTION.

#### CONFLICT OF LAWS.

1. Action by the receiver of an insolvent New York corporation on promissory notes made to the corporation by defendant, a resident of Massachusetts. Plea, that defendant had been summoned as garnishee of the corporation, in respect of the debt due on the notes, in an action pending in Massachusetts against the corporation. *Held* bad. — *Osgood v. Maguire*, 61 N. Y. 524.

2. An assignment was made in New York of a chose in action, which, by

the law of that State, vested the legal title and right of action at law in the assignee. *Held*, that the latter might sue in his own name in Pennsylvania, though he could not have done so if the assignment had been made there. — *Levy v. Levy*, 78 Penn. St. 507.

#### CONSIDERATION.

A promise by the payee of a promissory note to abstain from the use of intoxicating liquors for a certain time is a good consideration for the note. — *Lindell v. Rokes*, 60 Mo. 249.

#### CONSTITUTIONAL LAW.

1. A Virginia statute of 1861 enacted that parties to negotiable instruments payable in towns occupied by the United States forces should remain bound after the maturity of such instruments without demand, protest, or notice. *Held* unconstitutional, as impairing the obligation of contracts. — *Farmers' Bank v. Gunnell*, 26 Gratt. 131.

2. A corporation made a mortgage to trustees, providing that, if default should be made in payment of interest, the principal should become immediately due at the election of the trustees. Before the principal was regularly due the corporation became insolvent, and failed to pay interest; but the trustees made no election. A subsequent statute authorized the sale of the property of the corporation, free of the mortgage. *Held* unconstitutional. — *Randolph v. Middleton*, 11 C. E. Green, 543.

3. A State statute forbidding the importation of Texas or Mexican cattle into the State at certain seasons is a lawful exercise of the police power to prevent disease, and is not unconstitutional as a regulation of commerce. — *Wilson v. Kansas City, St. Jo., & Council Bluffs R.R. Co.*, 60 Mo. 184.

#### CONSTITUTIONAL LAW (STATE).

1. A State constitution provided that no county should be created of less than a certain size. *Held*, that, in determining the constitutionality of an act establishing a county, the court could look only at the act itself, or other official records of which they were bound to take judicial notice; and that, if the county did not appear from these to be too small, it could not be proved so *aliunde*. — *State v. Dorsey County*, 28 Ark. 378.

2. A statute fixed a maximum rate which might be charged for the use of grain warehouses, and made it penal for any person to keep such a warehouse without taking out a license and giving a bond to observe all the laws of the State. *Held* constitutional. (McALLISTER and SCOTT, JJ., dissenting.) — *Munn v. The People*, 69 Ill. 80.

3. The Constitution providing that no corporations shall be formed under special acts, the legislature by special act amended the charter of a railroad company incorporated before the adoption of the Constitution, so as to give the company a new name, confer the corporate powers on persons many of whom were different from those named in the original charter, and alter the line of the road. *Held* constitutional. — *Ames v. Lake Superior & Mississippi R.R. Co.*, 21 Minn. 241.

4. A statute authorizing the sale of land for taxes after notice by publica-

tion, not designating the names of the owners, and without personal service on any of them, though resident in the same county and state, *held* unconstitutional. — *Brown v. Levee Commissioners*, 50 Miss. 468.

See DEVISE, 2; EXECUTION; JUDGE; LIQUOR LAW; MUNICIPAL CORPORATION; STATUTE, 1, 3.

#### CONTRACT.

1. An attorney made a special contract with his client to prosecute a suit in equity for a certain fee, and a further fee to be paid in case of success. The client afterwards dismissed his suit without the attorney's consent. *Held*, that the attorney was not entitled, as matter of law, to recover the whole contingent fee; but that he might recover, either on a special count or a *quantum meruit*, the reasonable worth of his services. — *Polsley v. Anderson*, 7 W. Va. 202.

2. By statute of Wisconsin, commercial paper falling due on a Sunday or legal holiday is payable the day before. *Held*, that any other contract to be performed by its terms on a holiday, should, for the sake of uniformity, be governed by the same rule. — *Siegbert v. Stiles*, 39 Wis. 533.

See AGENT; AMENDMENT; ASSUMPSIT, 3; BONA FIDE PURCHASER; CONSTITUTIONAL LAW, 1, 2; EASEMENT, 3; EVIDENCE, 3; FRAUDS, STATUTE OF; GUARANTY; INDORSEMENT; INJUNCTION, 1; INNKEEPER; INSURANCE; LORD'S DAY; LUNATIC; PARTNERSHIP, 3; RESTRAINT OF TRADE; STAMP; USURY; VENDOR AND PURCHASER, 1, 2.

CONTRIBUTION. — See INSURANCE (FIRE), 2.

#### CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company to recover for injuries caused by a train to a person crossing the track, the jury were instructed that it was the duty of the person crossing "to make such use of all his faculties as would enable him to avoid danger, provided the managers of the train were doing their duty: if he did that, he was free from blame." *Held*, that the instruction was too favorable to the plaintiff. (DOWNEY and WORDEN, JJ., dissenting.) — *Toledo, Wabash, & Western Ry. Co. v. Shuckman*, 50 Ind. 42.

#### CONVERSION (EQUITABLE).

Where a power of sale in a mortgage is executed after the death of the mortgagor, the surplus, after satisfying the debt, is real estate, and the administrator of the mortgagor can maintain no action to recover it. — *Dunning v. Ocean National Bank*, 61 N. Y. 497.

See DEVISE, 3.

#### CORPORATION.

1. A corporation was formed in Georgia during the war, under a general law enacted before the war, for the purpose of trading with foreign countries, which could then be done only by running the blockade, in violation of the laws of the United States. In an action brought by the corporation after the war, *held* that the corporation was lawfully organized, and had power to sue. — *Importing and Exporting Company of Georgia v. Locke*, 50 Ala. 332.

2. A society incorporated for purposes of private charity had power to

make all by-laws not inconsistent with the Constitution and laws of the State. The Constitution recognized votes by proxy as lawful in "incorporated companies." *Held*, that, whether or not the society was within the meaning of this clause, it might make a valid by-law allowing voting by proxy at its elections. — *People v. Crossley*, 69 Ill. 195.

See BANKRUPTCY; CONSTITUTIONAL LAW (STATE), 3; DIVIDEND; NATIONAL BANK; RELIGIOUS SOCIETY.

COUNTY. — See CONSTITUTIONAL LAW (STATE), 1.

COVENANT. — See AGENT; ASSUMPSIT, 2; EASEMENT, 3; WARRANTY.

CRIMINAL LAW. — See CONSTITUTIONAL LAW (STATE), 2; EVIDENCE, 1, 5; FALSE PRETENCES; INDICTMENT; JURISDICTION; MURDER; TRIAL; VARIANCE, 1.

CUSTOM. — See EVIDENCE, 8.

#### DAMAGES.

1. Plaintiffs wrote to another town to ask the price of "extra mess" pork, and received a telegram in answer. They then sent a telegram in reply by defendants' line, offering to take "200 extra mess, price named." Defendants had no notice of the nature or object of the message, except what appeared on the face of it. They negligently failed to send it for four days. In the mean time the market price of pork advanced, and plaintiffs were compelled to buy at an advanced price. *Held*, that they could not recover this advance of defendants. — *Beaupré v. Pacific & Atl. Tel. Co.*, 21 Minn. 155.

2. Where the *ad damnum* laid in the declaration is greater than that laid in the writ, a verdict in excess of the latter sum, but less than the former, is good, and a new trial will not be granted. — *Roderick v. Balt. & O. R.R. Co.*, 7 W. Va. 54.

3. An infant was killed by the negligence of a railway company. In a statutory action against the company for the benefit of the infant's mother, evidence was offered that she was a widow, and received a pension on account of her child, which ceased upon the child's death. *Held*, that the evidence was admissible, though the loss of the pension was not laid as special damage. — *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613.

See CONTRACT, 1; VENDOR AND PURCHASER, 1.

DECEIT. — See BONA FIDE PURCHASER; FRAUD; NATIONAL BANK.

#### DEED.

A deed conveyed one undivided half of a ditch and flume used to convey the water of a river to a certain mill, "together with all the water of said river which may or can be conveyed through said ditch." *Held*, that only half of the water-privilege passed by the deed. — *Fogus v. Ward*, 10 Nev. 289.

See AGENT; CONDITION; HUSBAND AND WIFE, 1; MORTGAGE; WARRANTY.

DELIVERY. — See BILLS AND NOTES, 2.

#### DEVISE AND LEGACY.

1. Testator gave all his estate to his two children; and, in case of the death



of either, the whole to the survivor; and in case of the death of both, then over. No power of sale was given to the executors; and it was expressly provided that the property should not be sold or mortgaged until the younger child came of age. *Held*, that the devise over could take effect only on the death of both children in the testator's lifetime. — *Kelly v. Kelly*, 61 N. Y. 47.

2. Testator devised all his real estate to be sold, and gave to certain persons the proceeds of one tract of land, except twenty acres of said tract, particularly described, "which I hereby reserve for ever for the use of the members of the Methodist Church to hold their camp-meetings on." *Held*, that the twenty acres descended to testator's heirs, subject only to a perpetual easement for camp-meetings; and therefore that the legislature could not authorize a sale of the land, and the investment of the proceeds in another camp-meeting ground, without the heirs' consent. — *Saxon v. Mitchell*, 78 Penn. St. 479.

3. A woman domiciled in Virginia conveyed land owned by her in Pennsylvania to a trustee, in trust to sell it, and hold the proceeds subject to such disposition as she might thereafter direct. By her will, made and proved in Virginia, she gave the proceeds of the land to charitable and religious uses. *Held*, that the gift was a bequest of personalty, and not to be treated as a devise of the land; that therefore its validity was to be determined by the law of Virginia; and that, by that law, it was void. — *Bible Society v. Pendleton*, 7 W. Va. 79.

See WILL.

DISCHARGE. — See RES ADJUDICATA.

#### DIVIDEND.

The owner of stock in a corporation agreed to sell it at a certain price, at any time before a certain date, at the purchaser's option. Before the date fixed, a dividend was declared on the stock, payable after the date. Afterwards, but before the date, the purchaser took the stock. *Held*, that the dividend belonged to the seller. — *Bright v. Lord*, 51 Ind. 272.

#### DIVORCE.

1. A servant induced an infant daughter of his master to marry him, having obtained a regular license by falsely swearing that the infant was of full age. The marriage was never consummated; but the infant at once repudiated it, and returned to her parents. *Held*, that a divorce should be granted on her petition. (WALKER, J., dissenting.) — *Lyndon v. Lyndon*, 69 Ill. 43.

2. In a suit for divorce, want of residence of the petitioner in the State, as required by statute, must be pleaded in abatement. — *Dutcher v. Dutcher*, 39 Wis. 651.

See ALIMONY; ESTOPPEL, 1; MARRIAGE; MARRIED WOMAN.

DOMICIL. — See DIVORCE, 2.

DURESS. — See MARRIAGE.

DYING DECLARATIONS. — See EVIDENCE, 1.

#### EASEMENT.

1. A conveyance was made of land, with a building on it having windows

overlooking adjacent land of the grantor. *Held*, that there was no implied grant of an easement of light and air, and that the grantor or his assigns might lawfully build on such adjacent land so as to obstruct the windows. — *Keiper v. Klein*, 51 Ind. 316.

2. Where a tract of land which is subject to a servitude of maintaining a fence is divided into several lots which are conveyed to several persons, only those lots which are bounded by the fence remain subject to the servitude. — *Bronson v. Coffin*, 118 Mass. 156.

3. A. and B., who owned adjoining land, agreed under seal that A. should dig a well on B.'s land, and that both parties should for ever have access to and take water from it; and that neither party should sell or dispose of his interest in the well, unless he should at the same time dispose of his land. *Held*, that an easement was created appurtenant to the lands of A. and B., and passing by conveyances of those lands without express words. — *Warren v. Syme*, 7 W. Va. 474.

4. A. and B. owned separate parts of one building, and had an easement in common in passages and stairways which were partly on the land of each. A.; against B.'s objection, obstructed part of the passage on his own land. *Held*, that B. might treat the easement as extinguished, and obstruct the passage over his land. — *Dillman v. Hoffman*, 38 Wis. 559.

See DEVISE, 2.

EQUITY. — See HUSBAND AND WIFE, 2; INJUNCTION; WATERCOURSE.

EQUITY PLEADING. — See PARTNERSHIP, 1.

#### ESTOPPEL.

1. A wife obtained a divorce from her husband, who appealed from the decree, but afterwards married another woman. *Held*, that he was estopped to prosecute his appeal. — *Stephens v. Stephens*, 51 Ind. 542.

2. A grantee on condition subsequent cannot, in defence to an ejectment by the grantor for breach of the condition, deny the lawful seisin of the latter at the time of the grant. — *O'Brien v. Wetherell*, 14 Kan. 616.

3. A man who afterwards became bankrupt transferred property to plaintiffs, who lent it to defendants, to be returned on demand; and defendants, while so holding it, bought it of the bankrupt's assignees. *Held*, that they could not set up against plaintiffs the title so acquired, even if the original transfer to plaintiffs was in fraud of the Bankrupt Act. — *Nudd v. Montanye*, 38 Wis. 511.

See JUDGMENT; LORD'S DAY; RES ADJUDICATA; WARRANTY.

EVICITION. — See LANDLORD AND TENANT.

#### EVIDENCE.

1. A., being wounded in a fight by B., on the same day, expecting to die, made certain statements. He lived ten days longer; and, his physician expressing hope that he would recover, he said, "I hope so too," but at last died of the wound. *Held*, that evidence of his statements was admissible on the trial of B. for his murder. (ANDERSON, J., dissenting.) — *Swisher's Case*, 26 Gratt. 963.

2. The prosecutrix in a bastardy proceeding is not so far a party that her admissions may be given in evidence against her as such; but they can only be introduced to impeach her testimony, and therefore cannot, as newly discovered evidence, be a ground for a new trial. (*PETIT, C. J., and WORDEN, J., dissenting.*) — *Tholke v. The State*, 50 Ind. 355.

3. In an action on a written contract to sell "Cawnpore hides, with all faults," held (1) that parol evidence of usage in the trade was admissible to explain the meaning of "all faults;" (2) that, in the absence of such evidence, the words must be taken to cover all faults not inconsistent with the goods being actually Cawnpore hides. — *Whitney v. Boardman*, 118 Mass. 242.

4. A witness, called to impeach another, may be asked, on direct examination, whether, from the bad reputation of that other, he would believe him on oath. — *Keator v. The People*, 32 Mich. 484.

5. Indictment for assault with intent to kill. At the trial, the assault was not disputed; and the only question was one of justification. Held, that evidence that the prisoner had forfeited his bail, and had broken jail, was irrelevant, and inadmissible against him. — *Williams v. The State*, 43 Tex. 182.

See DAMAGES, 3; NEGLIGENCE, 2; RES ADJUDICATA; STAMP; STATUTE, 2; VARIANCE.

#### EXECUTION.

A statute giving a right to redeem land sold on execution, held not to apply to sales under executions issued on judgments recovered on contracts made before the statute. — *Oliver v. McClure*, 28 Ark. 555.

See ATTORNEY, 2; EXEMPTION.

#### EXECUTOR AND ADMINISTRATOR.

When a foreign executor is entitled to sue on recording his authority in the Probate Court, without taking out letters of administration in that court, his want of authority to bring an action before such recording is pleadable only in abatement. — *Smith v. Peckham*, 39 Wis. 414.

See CONVERSION.

#### EXEMPTION.

1. Property of a partnership may be claimed by the partners individually, as exempt from levy under legal process against them individually. — *Howard v. Jones*, 50 Ala. 67. And this though the partnership be insolvent. — *Dunklin v. Kimball*, id. 251.

2. Where an execution is levied on partnership property, either partner may sever his share, and claim an exemption therein; but the partnership as such, or the partners jointly, can claim no exemption. — *Russell v. Lennon*, 39 Wis. 570.

See INSURANCE (FIRE), 1.

EXTINGUISHMENT. — See EASEMENT, 2, 4.

#### FALSE PRETENCES.

The prisoner, by false pretences made in Indiana, obtained possession of property in New York. Held, that he was not punishable in Indiana. — *Stewart v. Jessup*, 51 Ind. 413.

See BONA FIDE PURCHASER.

**FALSE REPRESENTATIONS.** — See **BONA FIDE PURCHASER; FRAUD; NATIONAL BANK.**

**FELONY.** — See **BONA FIDE PURCHASER.**

**FENCE.** — See **EASEMENT, 2.**

**FIRE INSURANCE.** — See **INSURANCE (FIRE).**

#### FIXTURE.

A building was erected and used for a factory, and filled with machinery necessary for that purpose. *Held*, that the machinery was to be treated as realty, though it might be removed without injury either to it or to the building. — *Green v. Phillips*, 26 Gratt. 752.

**FOREIGN ATTACHMENT.** — See **CONFLICT OF LAWS, 1.**

**FOREIGN LAW.** — See **CONFLICT OF LAWS, 2.**

**FORGERY.** — See **STOCK.**

**FRANCHISE.** — See **TOLL.**

#### FRAUD.

Defendant, by false and fraudulent representations as to the condition of a corporation of which he was treasurer, induced plaintiff, who had a claim against the corporation, to forbear suing on it and attaching the corporate property, which was afterwards levied on by another creditor. *Held*, that plaintiff had no cause of action against defendant. — *Bradley v. Fuller*, 118 Mass. 239.

See **BONA FIDE PURCHASER; DIVORCE, 1; FALSE PRETENCES; NATIONAL BANK; STOCK.**

#### FRAUDS, STATUTE OF.

1. A partnership for the purpose of buying and selling land may be formed by parol. — *Holmes v. McCray*, 51 Ind. 358.

2. A surety on a promissory note procured another person to become a co-surety, promising to save the latter harmless. *Held*, that his promise was an original undertaking, and not within the Statute, as a promise to answer for the debt of another. — *Horn v. Bray*, 51 Ind. 555.

3. An oral agreement for the sale of an interest in an invention, before letters-patent are obtained, is not a contract for the sale of goods, wares, or merchandise, within the Statute. — *Somerby v. Buntin*, 118 Mass. 279.

4. An oral contract was made for the sale of an entire lot of goods. The purchaser accepted and received part, after the rest had been accidentally burnt while still in the hands of the seller's agent. *Held*, that the seller might recover the entire contract price. — *Townsend v. Hargraves*, 118 Mass. 325.

#### FRAUDULENT CONVEYANCE.

A voluntary conveyance, made with intent to defeat the recovery of damages in an action of tort against the grantor, is fraudulent as against the plaintiff in such action, though the action be not brought until after the con-

veyance, if the cause of action accrued before. — *Scott v. Hartman*, 11 C. E. Green, 89.

See RES ADJUDICATA.

GARNISHMENT. — See CONFLICT OF LAWS, 1.

#### GUARANTY.

A. agreed to furnish B. with goods to sell on commission, and C. guaranteed that B. should account for the proceeds. The goods were furnished by a partnership of which A. was a member. *Held*, that the partnership could maintain no action against C. on his guaranty, without proof that he knew that the goods were to be furnished by them. — *Barns v. Barrow*, 61 N. Y. 39.

HEIR. — See WARRANTY.

HOMESTEAD. — See INSURANCE (FIRE), 1.

HOMICIDE. — See MURDER.

#### HUSBAND AND WIFE.

1. Husband and wife, agreeing to separate, by deed conveyed the wife's land to a third person, in trust for the husband for life, remainder to the children of the marriage; and the husband covenanted not to claim the wife's earnings, and to pay to the trustee a certain sum for her support. *Held*, that the deed was void as against the wife, on the ground of the disability of coverture. — *Switzer v. Switzer*, 26 Gratt. 574.

2. Bill in equity by wife against husband, alleging that he had deserted her without her fault, and praying a separate maintenance, but not a divorce. Demurrer, for want of equity, overruled. — *Garland v. Garland*, 50 Miss. 694.

See ALIMONY; DIVORCE; ESTOPPEL, 1; MARRIAGE; MARRIED WOMAN; WILL.

ILLEGAL CONTRACT. — See AMENDMENT; LORD'S DAY; USURY.

IMPLIED GRANT. — See EASEMENT, 1.

IMPRISONMENT. — See MARRIAGE.

#### INDICTMENT.

1. Indictment charging that the prisoner "unlawfully and with malice aforethought did assault J. S. with intent to murder him." *Held*, that a simple assault, but nothing more, was well charged. — *Wood v. The State*, 50 Ala. 144.

2. Indictment for larceny of "a box containing two gold watches." *Held*, after verdict, that larceny of the watches was sufficiently charged; but *semble* that it would have been otherwise on demurrer. — *State v. Derst*, 10 Nev. 443.

3. Indictment charging larceny "from the possession of the owner." *Held*, that this misspelling was no ground for arresting judgment after verdict. — *State v. Williamson*, 43 Tex. 500.

See VARIANCE, 1.

#### INDORSEMENT.

The indorser of a note, before it fell due, in 1861, left Alexandria, Va., where he had thitherto lived, and which was then occupied by the United

States army, and joined his family within the Confederate lines, where he remained till the end of the war. Notice of dishonor of the note was left at his former place of business, and with a servant at his former residence, both in Alexandria. *Held*, that the notice was insufficient. (MONCURE, P., and CHRISTIAN, J., dissenting.) — *McVeigh v. Bank of Old Dominion*, 26 Gratt. 785.

See CONSTITUTIONAL LAW, 1; PARTIES, 1.

#### INJUNCTION.

1. An actor agreed to act with a certain company, and not elsewhere, for a specified time; and, in case of breach, "obligated" himself to pay to the company "a conventional fine of \$200, the claim of performing his engagement not precluded. This sum is already forfeited by any violation of the contract, and requires no particular legal proceedings for its execution." *Held*, that the company could not have an injunction to restrain the actor from performing with another company, but that their only remedy was at law. (The effect of the words in Italics was not discussed by the court.) — *Hahn v. Concordia Society*, 42 Md. 460.

2. Injunction granted to restrain the sale of land for taxes, where the owner had personal property out of which they might be collected. — *Johnson v. Hahn*, 4 Neb. 139.

3. Bill in equity against a sheriff, averring that he had seized, and was about to sell, plaintiff's goods, to satisfy a tax which had been paid. *Held*, that an injunction should be granted to restrain the sale, and that plaintiff was not confined to his remedy at law. — *Lewis v. Spencer*, 7 W. Va. 689.

See RESTRAINT OF TRADE; WATERCOURSE.

#### INNKEEPER.

Plaintiff's stallion stood at defendant's inn on regular days through the season, and was kept in a particular stall, of which plaintiff had the key. Defendant furnished oats for the horse, and meals for the man in charge of him, at an agreed price, less than the ordinary charge to travellers; and plaintiff fed and cared for the horse. *Held*, that defendant's custody was not that of an innkeeper; and, therefore, that he was not liable for the destruction of his barn and the horse therein by fire, without negligence on his part. (EARL and DWIGHT, CC., dissenting.) — *Mowers v. Fethers*, 61 N. Y. 34.

See CARRIER, 4.

INSANITY. — See LUNATIC.

#### INSURANCE (FIRE).

1. The constitution of a mutual insurance company provided that no person who had taken the benefit of the homestead law should become a member of the company. *Held*, that insurance made by the company on property of a partnership was not invalid by reason of one partner having taken the benefit of the homestead law. — *West Rockingham Mutual F. Ins. Co. v. Sheets*, 26 Gratt. 854.

2. Three companies insured goods in every part of a building. One of them made a further insurance of goods in the upper stories only. A loss happened, which, in the lower stories, exceeded the whole amount of the

first insurance, and in the upper stories exceeded the amount of the second insurance. *Held*, that the second insurance was payable in full, and that the first policies did not contribute to it. — *Royal Ins. Co. v. Roedel*, 78 Penn. St. 19.

#### INSURANCE (MARINE).

1. A vessel insured by a valued policy suffered a partial loss, which was repaired; and afterwards, while the policy continued in force, a total loss happened. *Held*, that the insurers were liable for the amount of both losses, though exceeding the amount named in the policy. — *Matheson v. Equitable Mar. Ins. Co.*, 48 Mass. 209.

2. A canal-boat was insured by policy exempting the insurers from liability if the boat should be "prevented or detained by ice" from finishing her trip. In a storm the boat was broken away from the tug which was towing her, and stranded. Ice formed round her during the night, and she remained frozen in for some days, until a thaw came, when she was cast against another boat, and lost. *Held*, that the storm, and not the ice, was the proximate cause of the loss, and, therefore, that the insurers were liable. — *Brown v. St. Nicholas Ins. Co.*, 61 N. Y. 332.

INTEREST. — See AMENDMENT; USURY.

JOINT LIABILITY. — See PARTNERSHIP, 1.

#### JUDGE.

A statute authorized causes in which the regular judge was interested to be tried, by consent of parties, before a counsellor of the court. *Held*, that the statute was unconstitutional; that persons assuming to act under it were not even judges *de facto*; and that their judgments were absolutely void. — *Van Slyke v. Trempeleau County Farmers' M. F. Ins. Co.*, 39 Wis. 390.

#### JUDGMENT.

By statute a mortgage may be foreclosed against a non-resident mortgagor, after notice by publication, and proof of such notice, to the satisfaction of the chancellor. A foreclosure decree declared that such publication had been made to the chancellor's satisfaction, and directed a sale. A purchaser at the sale objected to take the title, on the ground that the notice given was not that required by statute. *Held*, that the decree was conclusive evidence of the regularity of the notice; that the mortgagor would not be heard to aver the contrary, unless on appeal from the decree; and that the purchaser must take the title. — *McCahill v. Equitable Life Ass. Soc.*, 11 C. E. Green, 531.

See ATTORNEY, 1; MARRIED WOMAN; RES ADJUDICATA; TRIAL, 2.

JUDICIAL SALE. — See INJUNCTION, 3.

#### JURISDICTION.

A United States commissioner *held* not to have jurisdiction to punish a crime committed on an Indian reservation in the State of Nebraska. — *Painter v. Ives*, 4 Neb. 122.

See FALSE PRETENCES; JUDGE; REMOVAL OF SUITS.

LACHES. — See PAYMENT.

## LANDLORD AND TENANT.

A lease was made of a building to be used as a distillery; which could not be done, under the laws of the United States, without the written consent of the lessor, filed with the collector. *Held*, that the lessor's refusal to give such consent was a "constructive eviction," and discharged the lessee from liability for rent. — *Grabenhorst v. Nicodemus*, 42 Md. 236.

LARCENY. — See INDICTMENT, 2.

LEASE. — See LANDLORD AND TENANT; PARTNERSHIP, 4.

LEGACY. — See DEVISE AND LEGACY.

LEX LOCI. — See CONFLICT OF LAWS, 2.

LICENSE. — See LIQUOR LAW.

## LIEN.

A lien on a vessel, given by statute in certain cases, attaches only if notice thereof is filed, as prescribed by the statute, "within twelve days after" the departure of the vessel from port. *Held*, that notice filed before the vessel's departure was of no effect. (EARL and DWIGHT, CC., dissenting.) — *Squires v. Abbott*, 61 N. Y. 530.

See LIMITATIONS, STATUTE OF; MARRIED WOMAN; VENDOR'S LIEN.

LIGHT AND AIR. — See EASEMENT, 1.

## LIMITATIONS, STATUTE OF.

A bill to enforce a vendor's lien is not sustainable after the time when an action at law to recover the purchase-money would be barred by the Statute of Limitations. — *Linthicum v. Tapscott*, 28 Ark. 267.

## LIQUOR LAW.

By the Constitution of Michigan, the legislature cannot authorize the grant of license for the sale of intoxicating liquors. *Held*, that a law taxing the traffic in liquors was no infringement of this provision. — *Youngblood v. Sexton*, 32 Mich. 407.

LIS PENDENS. — See CONFLICT OF LAWS, 1; REGISTRY.

## LORD'S DAY.

The maker of a promissory note bearing date on a secular day is estopped, as against a *bona fide* holder for value, to show that it was made on Sunday. — *Knox v. Clifford*, 38 Wis. 651.

See CONTRACT, 2.

## LUNATIC.

Defendant borrowed money, and gave therefor his promissory note, which was discounted *bona fide* by plaintiffs. Afterwards defendant was found by inquisition to have been a lunatic at the time of making the note. *Held*, that he was nevertheless liable on it to plaintiffs. — *Lancaster County Nat. Bank v. Moore*, 78 Penn. St. 407.

MARINE INSURANCE. — See INSURANCE (MARINE).



## MARRIAGE.

A man, being arrested under a bastardy process, did not deny the charge, but, on his own request, was allowed to see the prosecutrix and "talk with her;" the result of which was that he married her, and so got rid of the prosecution. *Held*, that he could not have the marriage declared void on the ground of duress of imprisonment. — *Sickles v. Carson*, 11 C. E. Green, 440.

See DIVORCE, 1.

## MARRIED WOMAN.

An attorney who obtains for a married woman a decree of divorce and alimony has no remedy for his fees by action on her promise to pay them, whether such promise was made before or after the divorce; but he may enforce his lien on the decree. — *Putnam v. Tennyson*, 50 Ind. 456.

See HUSBAND AND WIFE.

## MARTIAL LAW.

At the close of the war, an officer of the Confederate army ordered all the liquor in a town within his military district to be destroyed, in order to prevent the soldiers from getting possession of it. In an action of trespass by an owner of liquor which was destroyed against an inferior officer who destroyed it, *held* that the latter could not justify under the orders of his superior. — *McLaughlin v. Green*, 50 Miss. 458.

MEASURE OF DAMAGES. — See DAMAGES.

MISTAKE. — See VENDOR AND PURCHASER.

MONEY. — See PAYMENT.

MONEY HAD AND RECEIVED. — See ASSUMPSIT, 1.

MONEY PAID. — See ASSUMPSIT, 2.

## MORTGAGE.

A mortgagee selling under a power of sale in the mortgage may, if its terms authorize him so to do, be the purchaser at the sale, and may make the deed in his own name directly to himself. — *Hall v. Bliss*, 118 Mass. 554.

See CONSTITUTIONAL LAW, 2; CONVERSION.

## MUNICIPAL CORPORATION.

A statute passed at a time when crops failed authorized towns to raise money "for the purpose of providing the destitute citizens of such towns with provisions and grain for seed and feed." *Held* unconstitutional, as being a tax on the whole community for the benefit of the farmers. — *State v. Osawkee*, 14 Kan. 418.

## MURDER.

By statute, murder committed in the commission of "any crime punishable with imprisonment for life" is murder in the first degree. *Held*, that a crime which might be punished by imprisonment for life, or by a lighter sentence, in the discretion of the court, was within the meaning of the act. — *Commonwealth v. Pemberton*, 118 Mass. 36.

## NATIONAL BANK.

Selling railroad bonds on commission is *ultra vires* of a national bank; and therefore no action lies against such a corporation for false representations made by its teller to induce the plaintiff to buy bonds. — *Weckler v. First National Bank of Hagerstown*, 42 Md. 581.

## NEGLIGENCE.

1. A drunken passenger who annoys other passengers on a horse-car may lawfully be ejected from the car by the conductor; and whether it is due care in the conductor to eject him while the car is moving is a question for the jury. — *Murphy v. Union Ry. Co.*, 118 Mass. 228.

2. Defendants hired a hall for a concert, and caused it to be decorated. Part of the decoration fell on plaintiff, and injured her, while the concert was going on. In an action by plaintiff against defendants, the above facts only being proved, *held* that there was no evidence of negligence to go to the jury. — *Kendall v. Boston*, 118 Mass. 234.

3. The servants of a railroad company left a turn-table open and unfastened. Several small children came and played on it, and set it in motion; and one of them was hurt. *Held*, that the company was liable. — *Keffe v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 207.

See BILLS AND NOTES, 1; CONTRIBUTORY NEGLIGENCE; DAMAGES, 1; INNKEEPER; PAYMENT.

NEGOTIABLE INSTRUMENTS. — See BILLS AND NOTES.

NEW TRIAL. — See DAMAGES, 2; EVIDENCE, 2.

NOTICE. — See CARRIER, 1, 3; INDORSEMENT; REGISTRY.

OFFICER. — See ASSUMPSIT, 1; JUDGE; PARTIES, 2.

## PARTIES.

1. The indorsee of a note "for collection" is a mere agent, and has no such property in the note as to be able to sue on it in his own name, if the law requires actions to be prosecuted in the name of the real party in interest. — *Rock County Bank v. Hollister*, 21 Minn. 385.

2. A suit begun by a public officer, in his capacity as such, *held* not abated by the appointment of another in his place. — *McDuff v. Beauchamp*, 50 Miss. 531.

See CONFLICT OF LAWS, 2; PARTNERSHIP, 1.

## PARTNERSHIP.

1. A partnership between A., B., and C., was dissolved, and the business was carried on at the same place by a new partnership formed between A. and B. A bill was brought by A. against B. and C. jointly for an account of both partnerships. *Held*, that the bill was multifarious, and bad on demurrer. — *Dunn v. Dunn*, 26 Gratt. 291.

2. Two partners were agents to manage a house belonging to another person. One of them, without the other's knowledge, unlawfully ejected a tenant from the house. *Held*, that the other partner was not liable, though he afterwards approved the act. — *Grund v. Van Vleck*, 69 Ill. 478.

3. Two persons formed a partnership for planting and cultivating land. One of them drew a bill of exchange in the firm name. *Held*, that the other was not liable on it, in the absence of proof that he assented to the drawing of the bill, or that the drawing of bills was a usage of such partnerships. — *Prince v. Crawford*, 50 Miss. 344.

4. A partnership formed to continue till a certain date took a lease for a term to expire at the same date, and made valuable improvements on the demised premises. During the term, one partner, without the knowledge of the others, procured a renewal of the lease in his own name, for a term to begin at the expiration of the former. *Held*, that in equity he was a trustee of the lease for the partnership. — *Mitchell v. Read*, 61 N. Y. 123.

See EXEMPTION, 1, 2; FRAUDS, STATUTE OF, 1; GUARANTY; INSURANCE (FIRE), 1.

PASSENGER. — See CARRIER, 4; NEGLIGENCE, 1.

#### PAYMENT.

A creditor received in payment of his debt a bank-note which was counterfeit, though the debtor did not know it to be such, and paid it in good faith. The creditor kept the note six months without inquiring into its genuineness. *Held*, that he was guilty of such *laches* as to bar him from demanding payment anew of the debtor. — *Wingate v. Meidlinger*, 50 Ind. 520; and see *Lawrenceburg National Bank v. Stevenson*, 51 Ind. 594.

PENALTY. — See INJUNCTION, 1.

PLEADING. — See AMENDMENT; DAMAGES, 3.

PLEDGE. — See STOCK.

POWER. — See AGENT; CONVERSION; MORTGAGE.

PRACTICE. — See AFFIDAVIT; AMENDMENT; REMOVAL OF SUITS.

PRINCIPAL AND AGENT. — See AGENT.

PRINCIPAL AND SURETY. — See SURETY.

PROMISSORY NOTE. — See BILLS AND NOTES.

PROXIMATE AND REMOTE CAUSE. — See INSURANCE (MARINE), 2.

PROXY. — See CORPORATION, 2.

QUANTUM MERUIT. — See ASSUMPSIT, 3; CONTRACT, 1.

RAILROAD. — See CONSTITUTIONAL LAW (STATE), 3; CONTRIBUTORY NEGLIGENCE; NEGLIGENCE, 1, 3.

RAPE. — See VARIANCE, 1.

RATIFICATION. — See PARTNERSHIP, 2.

REBELLION. — See WAR.

RECORD. — See REGISTRY; STATUTE, 2.

REDEMPTION. — See EXECUTION.

#### REGISTRY.

Notice of a pending suit concerning the title to land was registered as required by law in order to affect subsequent purchasers. The notice truly stated the parties to the suit, the nature of it, the conveyances involved, and

the land which passed by each, and concluded, "The following real estate is intended to be affected," followed by an incorrect description. *Held*, that the latter might be rejected as surplusage, and that the notice was sufficient. — *Watson v. Wilcox*, 39 Wis. 643.

#### RELIGIOUS SOCIETY.

The constitution of a religious society provided, that, in case of a schism, the common property should be proportionally divided among the members. Some of the members unlawfully chose trustees, and excluded the other members from the common property. *Held*, that there was no schism, and that the excluded members could not claim a division of the property. — *Nelson v. Benson*, 69 Ill. 27.

#### REMOVAL OF SUITS FROM STATE TO UNITED STATES COURTS.

1. A cause begun in a State court, and removed into the United States Circuit Court, was by the latter remanded to the court where it originated. *Held*, that proceedings in that court ought not to be stayed pending an appeal to the United States Supreme Court from the order of the Circuit Court. — *Ex parte State Ins. Co.*, 50 Ala. 464.

2. The defendants in an action brought in a State court filed a petition and bond for the removal of the cause into the United States Circuit Court; and afterwards, without taking any further steps for a removal, proceeded to trial on the merits. *Held*, that the right of removal was waived. — *Home Ins. Co. v. Curtis*, 32 Mich. 402.

3. Appeal from a final decree in equity. The Supreme Court refused to permit the removal of the cause into the United States Circuit Court pending the appeal. — *Williams v. Lowe*, 4 Neb. 382.

#### RES ADJUDICATA.

In ejectment by the assignee of a bankrupt to recover lands fraudulently conveyed by the bankrupt, evidence that a discharge was granted to the bankrupt after his examination, though contested by a creditor, is not conclusive for the defendant. — *Bradley v. Hunter*, 50 Ala. 265.

See JUDGMENT.

#### RESTRAINT OF TRADE.

A woman sold a bakery owned by her, and covenanted not to carry on the business directly or indirectly, in the same place, for ten years. Within that time she established her son in the same business within the limits of the same place, advancing him money to erect proper buildings and carry on the business, as she had done to her other children in their business. It appearing that the business was *bona fide* carried on by the son, and not by the mother, and no actual damage to the purchaser being shown, *held* that the latter could not have an injunction to restrain the mother from permitting or aiding her son to carry on the business. — *Harkinson's Appeal*, 78 Penn. St. 196.

RIPARIAN OWNER. — See WATERCOURSE.

**SALE.**—See **BONA FIDE PURCHASER**; **EVIDENCE**, 3; **FRAUDS**, **STATUTE OF**, 3, 4; **VENDOR AND PURCHASER**.

**SHIP.**—See **CARRIER**, 4.

**SIGNATURE.**—See **AFFIDAVIT**.

**SLANDER.**

The word "bitch," applied to a woman, is not actionable *per se*, nor can an innuendo make it so. — *Schurick v. Kollman*, 50 Ind. 336.

**SLAVE.**

A right of action which had accrued to a master for the wrongful beating of his slave held not to be defeated by the subsequent abolition of slavery. — *Fail v. Presley*, 50 Ala. 342.

**SOLDIER.**—See **MARTIAL LAW**.

**STAMP.**

When an agreement results from a series of letters, there being no formal written contract, none of the letters need be stamped in order to be admissible in evidence in an action on the agreement, even though one of them is a sufficient memorandum of the contract within the Statute of Frauds. — *Benziger v. Miller*, 50 Ala. 206.

**STATUTE.**

1. The Governor cannot, unless expressly authorized by the Constitution, approve a statute after the adjournment *sine die* of the legislature which enacted it. — *Hardee v. Gibbs*, 50 Miss. 802.

2. The official copy of a statute, duly enrolled and authenticated, is conclusive evidence of the law; and the court cannot resort to the journals of the legislature, or any other extrinsic evidence, to ascertain whether the statute was in truth duly enacted. — *State v. Swift*, 10 Nev. 176. *Contra*, *Legg v. Mayor, &c. of Annapolis*, 42 Md. 203; *Brady v. West*, 50 Miss. 68.

3. A statute not preceded by the formal enacting clause prescribed by the constitution held void. — *State v. Rogers*, 10 Nev. 250.

See **CONSTITUTIONAL LAW**; **CONSTITUTIONAL LAW (STATE)**; **EXECUTION**; **TOLL**.

**STATUTE OF FRAUDS.**—See **FRAUDS**, **STATUTE OF**.

**STATUTE OF LIMITATIONS.**—See **LIMITATIONS**, **STATUTE OF**.

**STOCK.**

J. S. having lent money on the security of certificates of stock, the assignment of which, purporting to be made by the true owner, was a forgery, gave up the certificates to the corporation issuing them, and took new ones in his own name. On bill filed by the true owner, held that J. S., and not the corporation, must bear the loss. — *Brown v. Howard Fire Ins. Co.*, 42 Md. 384.

See **DIVIDEND**.

**SUNDAY.**—See **CONTRACT**, 2; **LORD'S DAY**.

**SURETY.**—See **FRAUDS**, **STATUTE OF**, 2; **GUARANTY**.

**SURFACE-WATER.**—See **VARIANCE**, 2.

## TAX.

A citizen of Kansas agreed to sell and convey lands in Illinois on payment of the purchaser's notes, which were deposited with a third person in Illinois. *Held*, that the vendor was not taxable in Kansas on the notes. — *Wilcox v. Ellis*, 14 Kan. 588.

See ASSUMPSIT, 2; CONSTITUTIONAL LAW (STATE), 4; INJUNCTION, 2, 3; LIQUOR LAW; MUNICIPAL CORPORATION.

TELEGRAPH. — See DAMAGES, 1.

TENANT IN COMMON. — See EASEMENT, 4.

## TIME.

In computing time from the date, or from the day of the date, or from a certain act or event, the day of the date is to be excluded, unless a different intent is manifested by the instrument or statute under which the question arises. — *Bemis v. Leonard*, 118 Mass. 502.

## TOLL.

A statute enacted that any person or corporation, who should make certain improvements to facilitate the floating of logs on a river, should be authorized to take toll on logs put into the river. *Held*, that the statute purported to be a grant of a franchise, and was void for want of a grantee certain. — *Sellers v. Union Lumbering Co.*, 39 Wis. 525.

TORT. — See FRAUDULENT CONVEYANCE.

TRESPASS. — See MARTIAL LAW; PARTNERSHIP, 2.

## TRIAL.

1. Indictment for murder. Plea, that the prisoner had before been tried for the same offence; and that the jury at that trial, being unable to agree, had been discharged by the court in the prisoner's absence, and without his knowledge or consent. *Held* good. — *State v. Wilson*, 50 Ind. 487.

2. The record of a capital conviction failed to show that the prisoner was asked before sentence what he had to say why it should not be pronounced. The court reversed the judgment, and remanded the prisoner to be resentenced. — *Dodge v. The People*, 4 Neb. 220. *s. p. McCue v. Commonwealth*, 78 Penn. St. 185.

3. Before any prisoner is tried for felony in a superior court, he must, by statute, be examined before an inferior court, unless examination be waived by his assent entered of record in the superior court. *Held*, that a prisoner, after verdict and judgment against him in the superior court, could take no advantage of the omission of the preliminary examination. — *State v. Stewart*, 7 W. Va. 731.

TRUST. — See CONSTITUTIONAL LAW, 2; PARTNERSHIP, 4; RELIGIOUS SOCIETY.

TRUSTEE PROCESS. — See CONFLICT OF LAWS, 1.

ULTRA VIRES. — See NATIONAL BANK.

USAGE. — See EVIDENCE, 3.

## USURY.

A debt bearing interest at the legal rate fell due; and the creditor agreed to grant an extension of time, upon payment by the debtor of the amount which would then have been due if the debt had borne interest at a rate greater than the legal rate. *Held* not usury. — *Daniels v. Wilson*, 21 Minn. 530.

See AMENDMENT.

## VARIANCE.

1. By statute, whoever shall unlawfully have carnal knowledge of a woman against her will, or of a female child under twelve years of age, shall be deemed guilty of rape. *Held*, that, under an indictment charging the first of these offences, no conviction could be had on proof of the second. — *Greer v. The State*, 50 Ind. 287.

2. Plaintiff declared for damage to his land by reason of defendant's negligent obstruction of a natural watercourse, and at the trial proved damage by the flow of surface-water. *Held* a fatal variance. — *Munkers v. Kansas City, St. Jo., & Council Bluffs R.R. Co.*, 60 Mo. 334.

## VENDOR AND PURCHASER.

1. A tract of land, with valuable buildings upon it, was sold, the vendor representing and believing that it contained 127 acres. In fact, it contained but 81 acres. *Held*, that the purchaser was entitled to compensation for the deficiency, according to the average value of the land without the buildings, taking the price paid for the land with the buildings as the true value of both together. — *Hoback v. Kilgore*, 26 Gratt. 442.

2. A contract was to sell 166 acres; and the deed made pursuant thereto purported to convey that amount, "more or less;" but the land conveyed only measured 156 acres, the whole being worth about \$50 per acre. *Held*, that the purchaser was entitled to compensation for the deficiency. — *Triplett v. Allen*, 26 Gratt. 721.

See LIMITATIONS, STATUTE OF.

## VENDOR'S LIEN.

In Massachusetts, the vendor of real estate by an absolute deed has, in the absence of written agreement, no lien on the estate for the unpaid purchase-money. — *Akrend v. Odiorne*, 118 Mass. 261.

See LIMITATIONS, STATUTE OF.

VERDICT. — See DAMAGES, 2; INDICTMENT, 2, 3.

VIS MAJOR. — See CARRIER, 3.

VOLUNTARY CONVEYANCE. — See FRAUDULENT CONVEYANCE.

WAIVER. — See REMOVAL OF SUITS, 2.

WAR. — See CONSTITUTIONAL LAW, 1; CORPORATION, 1; INDORSEMENT; MARTIAL LAW.

## WARRANTY.

A deed from a father, with full covenants of warranty, does not, by the law of Massachusetts, bar, estop, or rebut his children and heirs, even to the extent

of assets received by descent from him, to assert against the grantee an independent title derived by inheritance from their mother; unless, perhaps, where his estate has been fully administered upon, and the covenants are afterwards broken. — *Russ v. Alpaugh*, 118 Mass. 369.

#### WATERCOURSE.

The plan for supplying water to a city included the pouring of water, by artificial means, into and through a natural stream, to the extent of 10,000,000 gallons every twenty-four hours. On bill filed against the city by an owner of land on the bank of the stream, averring his information and belief that such flowage would cause the stream to overflow, render his land valueless, and do irreparable damage, *held* that such flowage should be enjoined. — *Mayor, &c. of Baltimore v. Appold*, 42 Md. 442.

See DEED; TOLL; VARIANCE, 2.

#### WILL.

Under a statute saving from lapse a devise to a "child or other relation of the testator" who dies before the testator, *held* that a wife was no relation. — *Cleaver v. Cleaver*, 39 Wis. 96.

See DEVISE.

WITNESS. — See EVIDENCE, 4.

#### WORDS.

"*All Faults.*" — See EVIDENCE, 8.

"*Detained by Ice.*" — See INSURANCE (MARINE), 2.

"*Goods, Wares, or Merchandise.*" — See FRAUDS, STATUTE OF, 3.

"*Punishable.*" — See MURDER.

"*Relation.*" — See WILL.

"*Schism.*" — See RELIGIOUS SOCIETY.

"*Within Twelve Days after.*" — See LIEN.



## BOOK NOTICES.

*United States Digest.* A Digest of Decisions of the Various Courts within the United States, from the Earliest Period to the Year 1870; comprising all the American Decisions digested in Thirty-one Volumes of the United States Digest, with Careful Revision, and Important Additions. By BENJAMIN VAUGHAN ABBOTT. First Series. Vols. I. to XIV. Boston: Little, Brown, & Co. 1874.

THE first volume of this digest, which was published early in the year 1874, was noticed by us at the time (8 *Am. Law Review*, 592), and we have since briefly mentioned the successive volumes of the series as they appeared. The publication of the fourteenth volume, which completes the work, makes the present a fitting occasion for a more extended review.

It is difficult for any one, who has not himself undertaken such a task as Mr. Abbott has accomplished, to appreciate justly the difficulties of the work, and the necessary limitations which confined its author. The contents of thirty-one volumes cannot be packed again in twelve, as Mr. Abbott originally proposed, without sacrificing much for the sake of brevity; and we are not surprised that he found it impossible to make so great a condensation as he intended, but rather wonder that only two additional volumes were needed to contain his matter. In addition to the difficulties imposed by the necessity of compression, it can have been no easy matter to arrange his various heads so as to give fourteen symmetrical volumes. The author naturally deemed it undesirable to begin a title in one volume, and complete it in the next; yet so to classify his matter as to make his title end with his volume without sacrificing substance to form, when he was obliged to cut the alphabet thirteen times, required the exercise of no small ingenuity. Mr. Abbott's work can hardly, therefore, be tried by the same tests that would be employed in estimating an ordinary digest. Nor can we expect the same fulness in the treatment of each case which we should have a right to require if the volumes before us contained the decisions of a single State. If he had given us only the means of telling where to look for authorities on a given point, enough of each case to inform us upon what questions it bears, he would have done all that could fairly be expected in a work like the one before us. Nor ought we to demand the same profusion of cross-references that would have been possible if the author could have taken more room. We cannot simultaneously have the advantages of condensation and the luxuries which require space. A pocket Shakspeare cannot be printed in the type appropriate to a family Bible. Bearing in mind, therefore, the scope of the work, and the necessary conditions which its character imposed, we take pleasure in expressing our opinion that it has been done well and thoroughly, and that Mr. Abbott has achieved a greater success than was to have been anticipated. The promises of his preface have been fully kept. Indeed, he has done more. He promised us only a rearrangement of the old digest; but in several cases he has rewritten its contents, and given an adequate treatment of subjects, which, in the old digest, were imperfectly presented.

Thus "Admiralty" and "Patents" are heads under which will be found, not a revision of old matter, but substantially an entirely new treatment of the subject. The same is true of "California Land Titles;" and there are many heads throughout the volumes which have been to a greater or less extent rewritten.

In order to make the new digest represent the whole body of American reports, one hundred and six volumes, which were omitted in the old digest have been included. It was perhaps desirable to make this digest exhaustive, but, in glancing over the list of these volumes which is contained in the first volume, we are not entirely satisfied that many of them were not wisely omitted. Not a few of them belong to that class of reports for whose existence we have never been able to find any justification, — the reports of inferior courts, whose decisions are without authority; and we regret any evidence that their contents are deemed worthy of preservation, lest it may be taken as an encouragement which will lead to their multiplication. This remark does not, however, apply to all the volumes on the list, many of which could not properly have been neglected.

In the general arrangement of the work into titles, the classification of the old digest has been retained. This was obviously desirable: for, after a work has been so long in use, its titles are landmarks to which the practitioner is accustomed; and a change in the general classification would have led to much annoyance, and would have been as objectionable as a change in the names of old streets, whereby the geography of a whole city is confused. In the arrangement of decisions under the general heads, however, Mr. Abbott has not hesitated to introduce new and more minute classifications where the old classification seemed insufficient. We have compared the old subdivision with the new in quite a number of instances, — as, for example, under the heads of "Courts," "Guaranty," "Damages," "Execution," "Deeds;" and in all these cases Mr. Abbott's changes strike us as improvements, and as likely to facilitate materially the examination of the subjects treated. We are especially glad that the old classification of the decisions by States has been abandoned where it was not necessary. When the courts of several States have passed upon the same question, it is certainly desirable to have the several decisions grouped together. The old plan required the student to look through the decisions of each State before he could be sure that he had discovered every case that bore upon the point which he was examining.

Few cases have been omitted; and in this respect we think the plan adopted was right. No editor can anticipate the importance which a decision may possess to a particular inquirer, and the safest rule is to include them all. No matter how antiquated and obsolete the case may appear, it may shed a flood of light upon the construction of some statute or upon the history of some rule or principle, and may, therefore, be of great value. It is right that there should be some repository of all the decisions; and the knowledge that this digest includes nearly every thing will give the profession a feeling of security in using it, which they could never have if they knew that there were many decisions once thought worthy of preservation which it did not contain.

Whether in all cases the arrangement of the cases digested under their appropriate heads has been carried as far as was desirable, we are a little

inclined to doubt. Thus, for example, the title "Wills" has five main subdivisions: I. The power to make a will; II. How a will may be made or revoked; III. The formal probate of wills; IV. Validity, construction, and effect; V. Decisions of various courts upon particular wills. The fourth subdivision has one sub-head devoted to the construction of wills, under which are collected cases occupying some sixty-five pages of the digest: but the fifth subdivision occupies one hundred and thirty-one pages; and, out of the thirty-six hundred and twenty-seven paragraphs which compose the general title, twelve hundred and twelve are placed under this fifth head. In other words, two-thirds of the will cases are arranged with reference to some general heads of the law; and one-third are classified, substantially, merely as "will cases." In fact, the number of unclassified cases is much larger, as each paragraph does not correspond to a case. Thus, No. 8087 is as follows: "Instances of the construction of peculiar testamentary dispositions of property, and of the determination of questions arising upon the words employed by the testator, and the facts existing in the particular cases." There follows a list of forty-two New York cases. There are similar lists for other States; as at the end of the Massachusetts decisions there are thirty-five cases lumped together in the same way, and at the end of the North Carolina cases there are eleven. We are perfectly aware that the infinitely varied perversity of testators, and their untiring ingenuity in disguising their intentions, defy all efforts at minute classification; but we should suppose that a larger proportion of cases arising under wills would afford illustrations of the general principles of law than appears to be the case, if we accept Mr. Abbott's classification as the limit of possibility. It must, however, be discouraging, after reading all the cases which the digest states, to find that in the reports of each State there are many others to the character of which the digest affords no clew.

We think, moreover, that the cases collected under the last division of this title might have been arranged more felicitously, and cases involving the question of testamentary capacity or undue influence kept in distinct groups from those involving merely the construction of particular words. As it is, the cases reported in the same volume are kept together, and the connection between the cases is accidental; so that the reader must examine the whole class in order to be sure that he has seen all the cases bearing on any one question. The peculiar nature of the cases to be digested is doubtless responsible for the defects in arrangement which we have pointed out under this title; and perhaps the sufficient answer to some at least of our criticisms is, that an adequate statement of every will case could not be made within the limits of this work.

On the whole, we are satisfied that Mr. Abbott has done his work carefully and well, and that the profession is under an obligation to him for affording them the means of lightening sensibly their labors. We cordially recommend this digest to their attention, satisfied that they will find in it all that its editor has promised.

*A Digest of the Law of Evidence.* By JAMES FITZJAMES STEPHEN, Q. C. London: MacMillan & Co. 1876.

HERE is a law-book, or perhaps we should rather say the ghost of a law-book, or, more accurately still, the skeleton of a law-book, duodecimo in form and

bound in muslin. To come in such a questionable shape is a provocation to scrutiny. Every professional Hamlet is bound to challenge such an apparition in the name of all that is venerable in the methods hitherto practised in legal book-making. What, we beg to ask, do the profession think of an author who has the assurance to ask them to sit down to an entertainment in which the law of evidence as it is — in its length, breadth, and depth — is to be taught from one hundred and forty articles, printed on one hundred and thirty pages, duodecimo, as aforesaid, and more than half given up to illustration at that? Why, he is a pretender, of course! “Nothing of the sort,” as Miss Jerusha says, when the Member from Cranberry Centre insinuates that she is engaged.

Stephen is an honest name in English jurisprudence, and neither in its reputation for honesty or ability has it suffered any disparagement by this new production. “I have endeavored,” says the author in his preface, “to make a statement of the law of evidence which will enable not only students of law, but, I hope, any intelligent person who cares enough about the subject to study attentively what is here written, to obtain from it a knowledge of that subject at once comprehensive and exact, — a knowledge which would enable him to follow in an intelligent manner the proceedings of courts of justice, and which would enable him to study cases and use text-books of the common kind with readiness and ease.” We cordially say, that, in our opinion, he has succeeded; and we quite agree also with the conclusion of the learned author, “that any one who makes himself thoroughly acquainted with the contents of this book will know fully and accurately all the leading principles and rules of evidence which occur in actual practice.” It is an admirable and most valuable work, and we commend it to all whose intellectual stomachs can digest solid food, sincerely hoping that the author will receive from the profession all, and more than, the encouragement necessary to induce him to execute his intimated intention to “apply the same process to some other branches of the law.”

*The Philosophy of Law; being Notes of Lectures delivered during Twenty-three Years (1852-1875) in the Inner Temple Hall, London.* By HERBERT BROOM, LL.D., late Professor on Common Law to the Inns of Court. San Francisco: Sumner Whitney & Co. 1876.

*Another edition.* New York: Baker, Voorhis, & Co. 1876.

THIS book, the author informs us, is intended for the use of the public as well as of law-students. The value of law-books for lay reading is doubtful at best; but they are certainly useless if they omit to define the terms used, and worse than useless if they define inaccurately. Mr. Broom is guilty in both respects. What is an indenture? and what is a unilateral contract? are instances of questions suggested, but not answered, by him. Oversights of this kind are easy to explain, and not difficult to excuse. The more familiar a lawyer is with the language which he has to use, the more likely he is to forget how much explanation it needs to make it clear to the non-professional reader. But no explanation at all is better than such as this: “A tort is a wrong done by one person to another; the term being used in civil, not in criminal, procedure.” This comprehensive definition includes alike an assault and battery, a failure to take up a bill, a violation of marriage duties, and an illusory

execution of a power, under the head of "Torts." The definition of a crime is more diffuse, but not more helpful in practice; and to specify among the requisites of a deed, that it must "contain a contract," is hardly correct in a modern treatise on the philosophy of law, though it must be admitted that there is authority in the older books for such an expression. Properly speaking, a deed may not be or contain any contract at all, but may be a mere conveyance, which is a very different thing.

As a philosophy, indeed, this book has no pretensions: it comprehends only a certain number of rules of law, arbitrarily selected, stated with more or less accuracy, and illustrated by citations of cases. Of the history of these rules, their dependence on each other, and the reasons for them, the student is left in ignorance.

As, however, the author's reputation (well deserved by his other writings) will no doubt create a demand for the book, it may be well to mention that the San Francisco edition is much the prettier and better of the two American editions. The other has the citations inconveniently transferred from the margin to the end, and the spelling barbarously corrupted according to Webster.

*The Constitutional and Political History of the United States.* By DR. H. VON HOLST, Professor at the University of Freiburg. Translated from the German, by JOHN J. LALOR and ALFRED B. MASON. 1750-1833. *State Sovereignty and Slavery.* Chicago: Callaghan & Company. 1876. Pp. 505.

WE have here the first volume of what promises to be a very valuable series. It is able, lucid, terse, and compendious, and withal highly entertaining. One who has taken it up finds it difficult to drop it. The author tells us in his preface that he came to this country in 1867 as an emigrant, intending to become a citizen, and remained here for five years. He does not state why his plan was abandoned. He is evidently an enthusiast in the love of his subject, and does not fail to impart his strong feeling to his reader. But perhaps he does not sufficiently bear in mind that a dwarf on a giant's shoulder can see farther than the giant. He views the men and the acts of a century ago in the light of to-day. Of course he hates slavery, and fully understands its evils, and knows how very little it has to recommend it; but he does not sufficiently consider how or how gradually the opinion of the world has changed on this subject in the last hundred years. The decision in the case of Somerset, that, under the common law of England, no man could there be a slave, was made almost simultaneously with the decision in Massachusetts, that slavery was abolished in that State by her Bill of Rights. The slave-trade was made illegal by Great Britain and by the United States in the same year, and in both countries, after long and bitter struggles. The model people of the former country have probably forgotten that slavery existed in their colonies till the year 1832. Men have grown wiser since; but wisdom is a plant of slow growth in any the most favored part of our planet, and men are only to be judged in the light of their own day. Our author casts up to us too much the frequent inconsistencies of our political conduct with the principles of the Declaration of Independence; which is like ridiculing Christendom for not acting always as if it believed in the doctrines of the Sermon on the Mount. The inconsistency is too old and too palpable to be a subject of satire to-day.

But his story is well told, and generally with fairness; and it shows very clearly how the political questions before the country have constantly tended to become sectional, and to divide parties at last by geographical lines, and, indeed, almost always by a line running from east to west. It proves, too, that nothing but a universal sense of its necessity brought the varying powers of the country into a union, and that, up to the period (1833) at which this volume leaves us, the same conviction was continually needed to preserve it; and, without specially aiming to do so, it establishes the fact, that the greatest statesman who ever illustrated this Western hemisphere was Alexander Hamilton.

The book is very handsomely printed; but it has no index, and, like many other good books, is too large and heavy to be held comfortably in the hand during perusal. We heartily wish that publishers would consider more carefully the muscles of their customers in this particular.

*Massachusetts Reports*, 114. Cases argued and determined in the Supreme Judicial Court of Massachusetts, November, 1873-January, 1874. ALBERT G. BROWNE, Jr., Reporter. Boston: H. O. Houghton & Co., corner Beacon and Somerset Streets. 1876.

THIS volume, like its two predecessors, is the work of Mr. Green, and its publication restores the continuity of this series of reports to and including the 119th Massachusetts. The profession may congratulate itself, that, thanks to the exertions of the reporters since the passage of the Stat. 1874, c. 44, it now enjoys facilities hitherto unknown for the examination of the latest decisions in the investigation of any subject.

In fact, the general system of reporting now established is admirable; and one excellent feature, for which we have to thank the reporters alone (since it is not required by law), is the preservation of all the original papers, briefs, &c., in every reported case in convenient volumes in the Law Library at Boston. The value of these volumes cannot be over-estimated, as they preserve in a permanent form all the materials forming the cases submitted to the full court, with all the authorities cited. It is often difficult for a reporter to decide in what cases to preserve in the reports the arguments of counsel; and, considering the immense assistance which the conscientious research of advocates must be to a court of last resort, we think our reporters have often erred in not devoting more space to arguments. But this criticism will have less force in the future, if all the papers and briefs are always to be at hand where they may be consulted. This result might well be insured by legislation.

It may be remarked in passing, that, in the present volume, the arguments are reported in but very few cases; but, as the book is of the usual size, we have no doubt that it would have been impossible to take any other course than the one which has been followed.

The case of *O'Connell v. Kelly*, p. 97, settles a point with regard to power of sale mortgages which has often occasioned discussion among conveyancers, but has never been distinctly adjudicated; although a somewhat similar case, later in its actual decision, has before been published in *Alden v. Wilkins*, 117 Mass. 216. The holder of a second mortgage for \$500, containing a power of sale, having executed his power and sold the mortgaged premises, then sub-

ject to a prior mortgage for \$1,000, executed his deed to the purchaser in consideration of the sum of \$1,850, and also delivered his affidavit, reciting that the "mortgaged premises" were sold for \$1,850; and, an action of contract for money had and received being brought by the owner of the equity of redemption, it was held that parol evidence was admissible to show that the sale was subject to the prior mortgage, and that all the second mortgagee really received was the surplus above the prior mortgage, the affidavit working no estoppel.

The decision will be efficacious in preventing iniquitous suits founded upon merely technical grounds. In this case, however, the owner of the equity of redemption was not the original mortgagor; and no intimation is given as to whether the mortgagee would have been estopped by his affidavit as against the donor of the power.

*Towle v. Towle*, p. 167, decides that, notwithstanding the married woman statutes passed prior to 1874, a promissory note made payable to a married woman at the request of her husband, upon a consideration moving solely from him, is not her separate property so that she can maintain an action upon it, but that it is governed by the common law.

The cross-actions of *Aspinwall v. Curtis*, and *Curtis v. Aspinwall*, p. 187, affirm the English doctrine, that the employment by a seller at an auction sale, advertised as "positive" and "without reserve," of puffers, or by-bidders, renders the sale voidable by an innocent purchaser; but it is also held that the seller, in order to sustain the sale, may show that the purchaser was not influenced by the by-bidding.

No opinion is expressed upon the effect of by-bidding at an auction sale not advertised as positive or without reserve; and the law of Massachusetts remains unsettled upon this important subject, upon which the courts of the different States and those of Great Britain have arrived at very different conclusions.

A further decision in these cases is to the effect that a purchaser at an auction sale, who pays a sum of money upon the spot, to be "forfeited to the seller if the terms and conditions are not complied with," and with the further agreement that "the forfeiture of said money does not release the purchaser from the obligation to take the property," can avail himself of such payment *pro tanto* in a suit to recover the price of the property.

In *Harriman v. Boston*, p. 241, a suit for personal injuries received by reason of a defective highway, under Gen. Stats. c. 44, sect. 22, a majority of the court hold that evidence that a coal-hole on a much-travelled city street was open in the early morning, and open at noon when the plaintiff fell into it, and that the occupant of the premises did not know how it came open, may be submitted to the jury to show that the city had reasonable notice of the defect.

The majority of the court, in the discussion of the case, say, "We cannot say as matter of law . . . that there is not enough shown to warrant the jury in finding that the proper officers of the city, whose duty it is to attend to municipal affairs, either knew, or with proper diligence might have known, of it, in time to have prevented, by reasonable effort, the injury complained of."

As the statute in explicit terms requires the plaintiff to prove "reasonable notice of the defect," it is difficult to see the competency of evidence which

should simply have a tendency to show that the municipal officers, "with proper vigilance, might have known," in the language of the opinion; and, unless a reasonable opportunity to acquire knowledge is knowledge, the decision is illogical. We regret that the dissenting judges did not write opinions.

The criminal cases of the volume, of which there is a goodly number, are not worthy of especial mention, with the exception, perhaps, of *Commonwealth v. Carr*, p. 280, which holds that a defendant who pleads misnomer in abatement to an indictment for a misdemeanor, and against whom the fact is found on issue joined, is not entitled to plead over as a matter of right.

*Sparhawk v. Sparhawk*, p. 355, is a curious case arising under the divorce laws. A divorce *nisi* having been granted to a wife under the Stat. 1870, c. 404, sect. 3, the husband, in this case, applies to the court to have the divorce made absolute and for leave to marry again: but the court hold, that since the repeal of that section by Stat. 1873, c. 371, sect. 3, only the party to whom the divorce *nisi* had been granted can have such divorce made absolute; and that, therefore, the husband in the present case cannot be divorced *a vinculo* and have leave to marry again.

In *Garnett v. Garnett*, p. 379, it is held that the fact that both parties to a libel for divorce were insane when the libel was filed is not a conclusive reason for dismissing it.

An assignment of a mortgage in common form, with the usual words, "do hereby sell, assign, transfer, set over, and convey said mortgage, the real estate thereby conveyed, and the promissory note, &c., thereby secured," is held in *Durgin v. Busfield*, p. 492, to pass only the interest of the mortgagee in this mortgage, and not a separate interest owned by him in the land; and the decision probably settles the question, often mooted, whether the holder of two mortgages, intending merely to discharge his second mortgage, but using an ordinary blank discharge, also discharges his first mortgage.

*Daniels v. Newton*, p. 530, is an elaborate judgment of the lamented Justice Wells upon the question, whether an action for the breach of a written agreement to purchase land can be maintained, if brought before the expiration of the time given for the purchase, simply upon the ground of an absolute refusal on the part of the purchaser ever to purchase; the question being decided in the negative.

The work of the reporter throughout the volume is well and thoroughly done; and all the members of the profession who have recognized and appreciated the scholarly work of Mr. Green in the volumes which he has reported must have keenly felt, upon receiving the intelligence of his untimely death at almost the same time this his latest work was published, how great is the loss which they have sustained.

*The Flush Times of Alabama and Mississippi.* A Series of Sketches. By JOSEPH G. BALDWIN. Eleventh Thousand. San Francisco: Sumner Whitney & Co.

THIS book is a collection of papers originally published in the *Southern Literary Messenger*, intended to illustrate the times preceding the financial crash of 1837 and 1838.

These the author has been persuaded by his friends to publish in a book bound in gaudy green and gold.



The writer is a Virginian, as the dedication "to the old folks at home, my friends in the Valley of the Shenandoah," shows. His attachment for the old Commonwealth and her children is unbounded. He writes with facility, and some humor; but most of the sketches we do not think worth republishing. There is one paper only in the book which is of general interest to the bar of the country, because of its subject, and because it tends to postpone a little the oblivion which soon overwhelms forensic reputation.

We refer to the sketch of S. S. Prentiss as a lawyer, which is interesting and well judged. Prentiss was undoubtedly and easily first among his associates in power and genius; and, at the same time, the exemplar not only of the virtues, but of the vices, of the heterogeneous people and lawyers among whom he lived.

Though obliged to support one apparently boneless leg by a sort of twisted walking-stick, and of rather stout and sturdy figure, his appearance and carriage were noble; his head and face such as enabled him to express with the greatest emphasis all the emotions by which he was moved and by sympathy with which an audience is capable of being affected. His voice, which was a perfect organ for the expression of the tenderest feeling, the noblest sentiments, and the most bitter scorn and detestation, at once seized upon the fascinated hearer; and such was his eloquence in the true sense, that the aptest word was never wanting in which to clothe his thought. In his power with a jury, his fascination resembled that of Choate: and it can be readily understood how it was with the juries before which he appeared; he led them and ruled them, and like an organist played upon their very heartstrings, arousing at will their sense of honor and of wrong, their deep-seated prejudices and their warm affections. We have heard that one jury so far forgot the cause in their admiration for the counsel as to bring in this verdict: "The jury find for lawyer Prentiss, with costs;" and yet it is said by those who knew Prentiss best that his greatest legal efforts were before the courts in which questions of pure law were discussed. His power of memory was like that of Mithridates. He slept as little as Napoleon. He tried his cases best, he said, when he had sat up all night. With these extraordinary powers, he awoke and found himself famous; and his career, which was cut off at the early age of forty-two, was as brilliant as that of a meteor. Generous to a fault, the soul of honor and chivalrous courage, he spent night after night in the wildest orgies and most reckless gaming. He lost or won thousands upon the turn of a card with the careless gayety of Charles Fox.

The influence of such an example upon the rising profession was undoubtedly very bad. None of his young admirers had the genius, all imitated the vices, of the idolized leader. As Burke said of the imitators of the style of Dr. Johnson, "They have the contortions of the sibyl without her inspiration, the nudosity of the oak without its strength."

But, such is the transitory and ephemeral character of a lawyer's reputation, that, had not Prentiss identified himself with a political question in which he had the sympathy of a people otherwise opposed to him in politics, how few outside of the lawyers of the county courts in which he practised would have known that such a man had lived within forty years!

In one of the papers, entitled "Sharp Financiering," is an amusing

account of one Mr. Ripley, a gentleman who wished to transfer to his home in North Carolina in safety \$1,200 which he had collected in the Western town of T. He applied for a sight-bill of exchange on Raleigh to one Thompson, who acted as a banker or broker. Thompson, with characteristic politeness, said he would endeavor to oblige him, drew the bill, took his funds and five per cent commission, and at parting asked Mr. Ripley if he would oblige him by handing his correspondent, the drawee of the bill, a small parcel. Mr. Ripley was happy to oblige, and, after some adventures in the Creek country, reached Raleigh, handed the parcel to the banker, and presented the bill of exchange, with a request to him to honor the same. "That," said the banker, "depends a good deal upon the contents of this package;" opening which, Mr. Ripley found it contained the original sum (less the commission) paid by him to the drawee, who had thus charged him five per cent for carrying his own money to Raleigh!

Thompson used to remark that that was the safest operation, all round, he ever knew. He had got his exchange, the buyer had got his bill and the money too, and the drawee was fully protected! There was profit without outlay or risk.

*Reports of Cases determined in the Supreme Court of the State of Nevada during the Year 1874-75.* Reported by CHARLES F. BICKNELL, Clerk of Supreme Court, and Hon. THOMAS P. HAWLEY, Chief Justice. Volume X. San Francisco: A. L. Bancroft and Company, 1876.

THE judges of the Supreme Court of Nevada are three in number, and are elected. The reports are edited by the clerk and the chief justice. Four terms are held in each year; and the volume before us covers cases determined from the October Term, 1874, down to and including the January Term, 1876, and contains fifty-four cases. Our principal criticism of the reporting relates to the head-notes, which are unsatisfactory: they deal in generalities, and do not give any clear notion of the points actually decided. Most of the cases are of local rather than general interest, discussing questions of practice, construing State statutes, or deciding the title to lands.

In *State v. Central Pacific R.R. Co.*, p. 47, which was a suit to recover for taxes, it was held, on the authority of *Railroad Company v. Peniston*, 18 Wall. 5, that evidence could not be received to establish the proposition that the Central Pacific was a national road, constructed by the general government for the purpose of carrying into execution its powers over postal, military, and commercial matters, and was, therefore, exempt from State taxation; also that a foreign corporation cannot plead the Statute of Limitations in a personal action; also that the cash value of a railroad is its necessary cost of construction.

*The State ex rel. George v. Swift*, p. 176, was an application for *mandamus* to compel the respondent, as sheriff, to issue to the relator a license to conduct and keep the game of faro in Carson City for the term of three months. BEATTY, J., whose opinions in this volume are certainly elaborate, occupies twenty-two pages in a discussion of authority and principle on the question, whether a court can look beneath or beyond the statute-roll to the journals of the houses of the legislature to see whether or not what purports to be a law

was ever passed by the legislature in the form in which it is solemnly engrossed. Fifteen States have decided the question, — six of them in favor of this power of the court; and nine following the English rule, that the statute roll is conclusive. In Mississippi the court divided on the question. Nevada goes with the majority.

In *The State ex rel. Chase v. Rogers*, p. 250, under a provision of the State constitution that the enacting clause of every law shall be as follows, "The people of the State of Nevada, represented in senate and assembly, do enact as follows," a law from the enacting clause of which were omitted the words "senate and" is held to be unconstitutional and void.

In *Ex parte Spinney*, p. 323, BEATTY, J., thought that a law forbidding any one but a regular graduate of some chartered medical school, or a person who had practised medicine in Nevada for ten years preceding the passage of the law, to practise or prescribe as a physician, was in conflict with the Fourteenth Amendment to the Constitution of the United States. HAWLEY, C. J., thought not, as did also EARLL, J.; but the latter, not having heard the arguments, did not participate in the decision, which was on another ground.

*State v. Rover*, p. 388, the verdict on an indictment for murder was, that the defendant was guilty as charged. This the court, under a statute requiring the jury to designate by their verdict, the degree of the crime, hold to be an insufficient verdict on which no judgment could be had, and refuse the application of the defendant to be discharged, and order a new trial, on the ground that the acquiescence of the defendant in the verdict, when he might have had it amended, prevented him from claiming that he had ever been in jeopardy.

*Commentaries on the Laws of England.* By HERBERT BROOM, LL.D., of the Inner Temple, Barrister-at-Law, Reader in Common Law to the Inns of Court, Author of "A Selection of Legal Maxims," &c.; and EDWARD A. HADLEY, M.A., of Lincoln's Inn, Barrister-at-Law, late Fellow of Trinity College, Cambridge. In Two Volumes. With Notes by WILLIAM WAIT, Counsellor-at-Law. Albany, N.Y.: John D. Parsons, Jr.

WE regret to say that the American notes to this work are of the kind to which we have become accustomed in reprints of English law-books. They are simply a piece of slop-work. The task attempted by the editor was one which it was impossible to execute successfully, however seriously undertaken. When an author has produced a fluent and coherent exposition of one body of law, it must always be felt to be an impertinence for a stranger to interrupt the current of his thought and destroy the unity of his conception by occasional statements of the parallelisms or divergences of another system. Not only is the English treatise spoiled for the reader, but the patching never succeeds in making it available as an American commentary. But, if such an attempt must needs be made, the reader has a right to expect some of the qualities which would have fitted the editor to write an original work. It is not enough to collect a string of cases, even if many of them are late: they must be studied and thought about. It is not enough to have studied and thought: the editor must know what to omit, and when to say what he does say. He must, moreover, carefully adjust himself to the scale of his author;

and, when the text is dealing in a broad way with general principles, he most emphatically must not incumber his notes with all the disproportionate details which can be gathered from Mr. Abbott's digests. Whether the notes before us comply with these canons, we leave the reader to judge, if he is curious on the matter.

*The Law of the Road, &c.* By R. VASHON ROGERS, Jr. San Francisco: Sumner Whitney & Co. New York: Hurd & Houghton.

WE have read Mr. Rogers's book with some care, to give it the examination which its novelty, at least, warranted. Our author does not say whether his effort is intended for the professional or the lay reader. The latter will doubtless be attracted by the narrative style; but we can easily see that he may experience no little embarrassment how to take this primer of the law, or hornbook of litigation. If allured into it as a work of entertaining fiction, he will find it harder reading than *Sir Charles Grandison* or the *Great Cyrus*, the narrative is so manifestly the mere framework whereon to hang the drapery of the law; and its interruptions leave the reader's mind with a curiously jolted feeling, such as his person would experience from his car running off the track. On the other hand, his interest in the story may beguile his attention from the points decided, and leave him with the conclusion that mixing law and fiction, as Lamb said of brandy and water, spoils two good things.

Speaking from the merely legal point of view, we must admit that the book has no small merit. The necessity of suiting the lay reader compels a clear condensation and simplicity in stating the points decided, in which our author has been quite successful; and the thread of narrative serves the double purpose of fixing the point as stated by some *striking* incident connected with it, thus utilizing the strongest elements of memorizing, — the picture faculty and the law of association,

"Segnius irritant animos demissa per aures  
Quam quæ sunt oculis subjecta fidelibus;"

and also furnishing an order of the subject easily apprehended by the unprofessional reader, and so facilitating reference, and not unintelligible to the lawyer.

So far as we have examined the book, we find no errors of statement of the results of cases, and not many omissions. Among them is the case of *Norway Pl. Co. v. B. & M. R.R.*, 1 Gray, 263, which, with the recent decision of *Hart v. Rice*, 118 Mass. 201, distinguishes our Massachusetts rule as to liability of carriers after the transit has ceased from that of most of the States, and perhaps of England. We also consider it unfortunate that our author could not have incorporated the recent case of *Commonwealth v. B. & A. R.R.*, decided in this State a few weeks since, by which it appeared that the provisions of the General Statutes of Mass., c. 63, §§ 97, 98, authorized railroad companies to kill, without charge, any bachelor or childless widower not a passenger; whereas, if the victim were a husband or father, it would cost the railroad \$5,000 to indulge in its little amusement. We have always heard that the law favored marriage, but think this a little too strong. It is, in effect, a game law, and might properly have preceded the title in the General Statutes,

"Bass, when to be taken," with "Bachelors, when may be killed." We think Mr. Rogers may appropriately include it in his next edition.

His work, however, does not profess to exhaust the topics, or the authorities bearing on them; and this want of completeness may be urged against it, and to some extent admitted as a defect, at least for the professional lawyer. We should hardly advise this style of treatment for law-books in all departments.

We are, however, disarmed as critics by the professions of humility on the author's part, and may attribute to these the gentle temper of our predecessors in that function, whose pens, the preface informs us, "have been dipped in a solution of honey and sugar" (a very nasty mess, we should say). We wish the preface had not spoken of the humility of *Heap*. It may be a pun,—for the book is funny by intention,—meant to indicate the manner of compilation adopted; or it may be a blunder, for we grieve to say that our old friend "Tony Veller, the beloved of forty mile of vidders," is designated (p. 213) as "Samivel Veller, Sr." And again: on p. 6 we find a reference to Judge "Sir John Moore." Our historical reading had led us to suppose this gentleman to be the general, whom, from our boyish days, we "buried darkly at dead of night;" laid him down "slowly and sadly," &c., to the melody of Wolfe's immortal verse. Perhaps it was one More, the father of the great chancellor, to whom Mr. Rogers refers. If Mr. Rogers's spelling be intentional, it adds to history the new fact that Thomas Moore was executed in the reign of Henry VIII. for high treason; which would startle the admirers of the light-hearted bard of *Lalla Rookh* and the *Fudges*.

We would not be hypercritical; but we hope that *instrumenta bella* (p. 243) and *cum personam* (p. 209) are not the author's own notions of the proprieties of the Latin tongue.

But we have graver cause of complaint with the book than omissions or misprints. There are risks in this mode of law-book writing which lead us lawyers to withhold from it our approval. Not only may it invade all branches of the law, but the fascination of thus bringing legal lore from its mysterious home to all the occasions of life may allure authors in other departments of literature into casing their peaceful efforts also in the steely panoply of the law. Such a mode of treatment may, on Mr. Rogers's plan, easily become general; for it can be as readily applied to a cook-book as to a novel. The late Mr. Greeley, for instance, could have sandwiched his treatise, "What I know about Farming," with what he didn't know about law, by connecting his chapters on the soil with a discourse on real property in its various branches. Those on the stock might have been made to bear a dissertation on sale, warranty, or distress, and the farm-buildings have been garnished with a lively sprinkling of lien cases. In fact, we see no end to the possibilities thus opening to view. Every book will be freighted with legal information. We shall soon find, under this new dispensation of law for the million, our occupation as lawyers gone. Not merely will every man, but every woman and child, be their own lawyer; and the wife of our bosom will respond to a playful tap by citing to us the case of *Commonwealth v. McAfee*, 108 Mass. 458, while intimating to us her contempt for Judge Buller's thumb and his law. No, Mr. Rogers: really, this sort of thing will not do.

*Reports of Cases argued and determined in the Supreme Court of the State of Wisconsin.* With Tables of the Cases and Principal Matters. O. M. CONOVER, Official Reporter. Vol. XXXIX. Containing cases determined at the August Term, 1875, and the January Term, 1876. Chicago: Callaghan & Co. 1876.

MR. CONOVER has caught up with the court, and stands, we believe, in enviable prominence as the only reporter, who, in July, has published all the cases determined prior to June 6. That the volume before us contains all the determined cases not before reported is due to the energy of the reporter; that he is able to give the profession the reports so rapidly and promptly is due to the court. In most instances, the court only are to blame for the tedious and often inexcusable delays; but we are glad to omit the Wisconsin court from the unworthy catalogue of those who render more blind and treacherous the paths of the profession by concealing from them the sources of light. It will hardly be possible in Wisconsin, as it is in some of our older States, for counsel to advise their clients, bring suit, and, after trial, to argue the questions of law in the Supreme Court, only to find that that august and deliberate tribunal had decided the question more than a year previously, and one of its members was still engaged in drawing the opinion.

From the reported cases we select for notice the following: *Hall v. The State*, p. 79, in which it is decided that a commissioner to make geological surveys, with whom the Governor of Wisconsin on behalf of the State made a contract for services for five years at a stipulated salary, could not recover for salary earned during that time, and after the repeal of the law authorizing such a contract; that the plaintiff was a public officer; and that the repeal did not impair the obligation of a contract.

*Van Slyke v. Trempealeau County Farmers' Mut. Fire Ins. Co.*, p. 390, was one of three cases reported in this volume which involved a change of venue on account of prejudice in the presiding judge. In this case, advantage was taken in the court below of a statute which permitted a member of the bar to be agreed on, in case of prejudice in the judge, who thereupon should preside and have and exercise for that case all the powers and duties of a circuit judge. The plaintiff had a verdict and judgment: the defendant appealed. Mr. Chief Justice RYAN gives the opinion, to the effect that the legislature cannot confer judicial power on a member of the bar in a State where the constitution has vested all judicial power in courts and justices of the peace, and provided for the election of the judges. We do not dissent from this proposition, and notice the case chiefly that we may add to the "curiosities of the reporters" this choice selection. After likening the circuit judge to the sun and the deputed lawyer to the moon of the court below, he says, "But the constitution mars the comparison: for, by the astronomical constitution, the sun appears to take power to delegate his functions of lighting the world; while the State constitution tolerates no such delegation, and appoints a sun only, without any moon, as luminary of the Circuit Court, whose 'gladsome light of jurisprudence' must be sunshine only, not moonshine." We wonder that some allusion was not made, in this connection, to the fact that the name of the deputed lawyer was "Cole."

*Northrup v. Trask*, p. 515, decides a question of trover, on the proposition,

that, in the absence of evidence, there is a presumption that a house is so attached to the soil as to be part of the realty.

In the *Matter of the Motion to admit Miss Lavina Goodell to the Bar of this Court*, p. 282, and in the *Matter of the Motion to admit Ole Moeness, Esq., to the Bar of this Court*, p. 509, show, by their titles, their subject-matter; but, although they will be of little use as precedents, they afford material for quite an essay. Both motions were refused. In both cases, the chief justice gives the opinion. In the first, after depicting the coarseness, brutality, and obscenity frequently met with by the profession, and giving a catalogue of the "unclean issues" that have to be dealt with by courts, he refuses voluntarily to commit the delicacy, the virtue, the impulses, the susceptibility, the graces, the emotions, the tenderness of woman to such studies and such occupations. He makes certainly a pertinent observation when he says, "And when counsel was arguing for this lady, that the word 'person,' in sect. 32, c. 119, necessarily includes females, her presence made it impossible to suggest to him, as *reductio ad absurdum* of his position, that the same construction of the same word in sect. 1, c. 37, would subject woman to prosecution for the paternity of a bastard, and in sects. 39, 40, c. 164, to prosecution for rape."

In the other case, the court take, as we think, wholly untenable ground in refusing to admit to the bar of the court a lawyer admitted in Illinois, and who conformed to the requirement of the Wisconsin statute of admissions. The Wisconsin statute provides, that any person duly admitted in Illinois, who has a good moral character, shall, on written application, &c., be admitted and licensed to practise in Wisconsin. The court say that it is beyond the legislative power; that they will not have a non-resident bar; that the power of designating who shall not practise law before them is wholly in the court; and that, if any member of their bar removes from the State, he loses his right to practise before them.

Both of the opinions emphasize what every judge would do well to write down, and commit to memory so completely that it could never be forgotten, that the office of an attorney-at-law is one of great official trust and responsibility in the administration of justice, that a good bar is essential to a good court, that the facility and accuracy of judicial labor are largely dependent on the learning and ability of the bar, and that no court is much better than its bar. There has sprung up in many quarters a restless dissatisfaction with the bench, a questioning of the court's motives. In nearly every instance it can be traced to improper relations between the bench and bar, to a lack of cordial support, to a pompous disregard of lawyers' rights, to the arbitrary exercise of power, to what comes soon to be considered the mere "insolence of office." We are glad to find that the court in Wisconsin declare themselves aright.

*A Treatise on the Law of Personal Property.* Vol. II. Embracing Original Acquisition, Gift, Sale, and Bailment. By JAMES SCHOULER, Author of "A Treatise on the Law of the Domestic Relations." Boston: Little, Brown, & Co. 1876.

THE first volume of this work appeared three years ago (see 7 Am. Law Rev. 711). That volume was considered by the author a complete work

in itself; but, in the preface to it, the intention was intimated of adding another volume on "Title," provided the reception of the first were such as to justify a new venture. In the preface to the present volume, it is stated that the other was so well received as soon to convince both the author and the publishers that a second must follow.

The general plan of the work, as indicated in the first volume, is followed also in this; and the various methods of acquiring title are treated in a general and elementary manner, and without any approach to an exhaustive presentation. The first chapter is devoted to the question of Title by Original Occupancy; and the qualification of the theories of Blackstone, Savigny, and others as to the origin of fixed property, by Sir Henry Maine, is cited with apparent approval. The idea of the author, presented by him as his original contribution to the solution, that the "labor and pains" bestowed by the individual upon an object of which he has taken possession are to be taken into account as a means of strengthening his title, may, however, be found in Locke's *Discourse on Government*, and has been many times repeated by other writers. We cannot agree with the writer, that such matters, "questions of sentiment concerning title" as he rather inaccurately calls them, should be left "to the metaphysicians." If Savigny and Maine have taught us any thing, it is that such questions as this do not lie in the domain of the metaphysician, but in that of the legal historian. The subject, we insist, cannot in these days be set aside in an "elementary" treatise, as the author in one place calls the present, though it may perhaps be in what is generally understood as a "practical treatise," — a phrase by which he also rather inconsistently designates his work.

Following the chapter on Title by Occupancy are some pages devoted to Title by Accession and by Confusion. Part V., comprising a hundred and thirty pages, is concerned with Gifts *inter vivos*, and Gifts *causa mortis*.

Part VI. forms two-thirds of the volume, and consists of a treatise on the Law of Sales. Part VII. is termed "Miscellaneous," and has twenty pages on "Indorsement and Assignment," and on "Limitations;" and the book terminates with Part VIII., consisting of fifteen pages on "Bailment." This enumeration of the contents of the book will serve to indicate its character as well as any thing we can say. In fact, we find it somewhat difficult to classify the work. If it is an elementary work, of which the present volume is devoted to a presentation of the various methods of acquiring title to all kinds of property except real property, we naturally look for such a scientific laying-out of the subject as should embrace all the usual modes of acquiring title with their leading characteristics. But it is not necessary to refer to other authors to see that some of the leading methods of acquisition find no place here. Without referring to minor methods, where are the methods of acquisition by legacy and inheritance, called by Blackstone "Title by Testament and Administration"? They do not occur in the volume on "Title;" but, by reference to the preface, we find that the subject of "Legacies and Distributive Shares" was treated in the first volume as one of the "Leading Classes of Personal Property," as "Ships and Vessels," "Money," "Debts," "Patents," were others, and this was held to have made it unnecessary to consider the subject in reference to methods of acquiring title. This is a kind of legal *encyclopædie* not



usually found in scientific treatises. If, on the other hand, we consider the work as a "practical treatise," it is not without value; though in this respect its value is diminished by the lack of fulness in details which the plan of the work necessarily excluded. As intimated in our notice of the previous volume, we suspect the division of "Personal Property" not a profitable one to make in a work designed to aid the practising lawyer; and, whatever may be its possibilities in a scientific plan, the present book is not conceived and carried out with scientific method.

The inequality of treatment, by which the greater part of the present volume is devoted to the subjects of "Gifts" and "Sales," has given us, however, two good treatises on those subjects. A perusal of the chapters on Gifts, and the greater part of those on Sales, enables us to say, that principles are set forth with clearness, and such a selection of cases made as serves to elucidate and justify them. The subject of Gifts is here treated as fully and satisfactorily as could be wished in a general treatise. It is to be regretted that the author had not determined on the production of some special works on some of the leading topics included in these volumes, where his conscientious patience and thoroughness would have insured valuable results.

*The Practice in Proceedings in the Probate Courts*; including the Probate of Wills; Appointment of Administrators, Guardians, and Trustees; Allowances; Sale of Real and Personal Estate; Settlement of Accounts; Distribution of Estates; Assignment of Dower, with Table showing the Present Value of Estates in Dower; Partition of Lands, &c. With an Appendix of Practical Forms, designed for the Use of Executors and Others having Business in the Probate Courts. By WILLIAM L. SMITH, Counselor-at-Law. Third Edition. Boston: Little, Brown, & Co. 1876.

THIS convenient little manual of Massachusetts probate law and practice has been familiar to the profession for some thirteen years, and its value has been tested by constant use. The present edition, which contains the changes in the law made by the statutes passed since the publication of the original work and the recent decisions on the various questions arising in probate practice, will be heartily welcomed. We are satisfied, from our examination, that the author has succeeded in his effort "to make the work complete."

A single additional case, published since the appearance of this book in the 114 Mass., might be added to his citations under the head of "The Revocation of Wills." We refer to *Wallis v. Wallis*, which decides, that, upon the issue whether a will was revoked or not, the contestant may show that the testator executed a subsequent will which contained a clause revoking the will offered for probate, although such subsequent will cannot be found, and its contents cannot be proved with sufficient accuracy to admit it to probate as a lost will.

When, on our examination of the book, we encountered the statutes of the last session which authorize trustees and executors to mortgage real estate, we were reminded of the accidental blunder which nearly defeated the beneficent intention of the legislature, so far as executors were concerned. A statute was first drawn, enacting that the court might authorize a trustee to mortgage any real estate of which he was "seized or possessed." The legis-

lature subsequently desiring to confer the same power on the court, with reference to executors or administrators, the language of the first statute was followed, and an act empowering the court to authorize executors or administrators to mortgage any real estate of which they were "seized or possessed" passed the judiciary committees of both branches, and the Houses themselves. Fortunately, the blunder was detected before it was irreparable; but whether the legislature knew precisely when it was corrected, may be doubted. We mention it as an illustration of the way in which the legislature, while searching after recondite objections to legislation, sometimes overlooks what "he who runs may read."

*Digest of Michigan Reports*, including nearly Twelve Volumes of the Regular Series; embracing one by Clarke (22 Mich.), and ten by Post; together with the Cases contained in the 11th of Post (33 Mich.) to the April Term of 1876. A Supplement to Cooley's Digest of 1872. By HENRY A. CHANEY. Detroit: Published by the Editor. 1876.

THIS is not only a supplement to Cooley's Digest of 1872, but its paging is consecutive thereto, "for the sake of the index, which covers both volumes." We gladly hail the prompt appearance of digests of reports: they are great savers of labor, and are essential to the peace of mind of the busy lawyer. It is refreshing to have a volume appear, actually digesting, as this does, the cases in advance of their publication in the regular series of reports.

This digest is in excellent form: its type and arrangement are both good. The index appears to be exhaustive. It is impossible for us to say more than this, having no opportunity to compare the digest with the cases digested, nor to use the book in practice, — the true test of its value. We wish, however, not to be misunderstood, when we say it is in excellent form. We refer to its mechanical arrangement and appearance. It is not based on what we have stated, over and over again, to be our idea of what a digest should be, — a brief statement of the facts in each case, with the determination of the legal questions under a "held;" but it is a rather notable example of the reverse of this, and fails to give any idea whatever of the facts in the case which decides what the digester says is decided.

*Fire Insurance Cases*; being a Collection of all the Reported Cases on Fire Insurance in England, Ireland, Scotland, and America, from the Earliest Period to the Present Time, chronologically arranged. Vol. IV. Covering the Period 1855–1864. With Notes and References by EDMUND H. BENNETT. New York: Published by Hurd & Houghton. Cambridge: The Riverside Press. 1876.

OF the value of this collection of cases there can be but one opinion; and the fact that the editors and publishers have been encouraged to go on seems to indicate that the work is appreciated. Considering the enormous developments which insurance law, especially fire and life insurance law, has received during the last twenty years, we are not surprised, though we regret it, — for the completeness of the collection was its great attraction, — that the editor has had to content himself with giving us in this volume abstracts of the less important cases, instead of the full cases, whether important or unimportant,

as heretofore. We suppose he had no alternative but to reduce the number of volumes by an abridging process which would not seriously reduce their value, so that the great expense would not prove an insurmountable obstacle to the success of the work. We understand it is expected in another volume to bring the cases down to the present time. We hope the experiment will prove remunerative to both publisher and editor.

*Cases determined in the United States Circuit Courts for the Eighth District.*

Vol. III. Reported by JOHN F. DILLON, the Circuit Judge. Davenport, Iowa. 1876.

WE have already noticed in previous numbers of the *Review* the earlier volumes of this admirable series of reports. The volume before us, appropriately dedicated to the Hon. Ebenezer R. Hoar, is of the same excellence as its predecessors. It contains many cases of great general interest, which are admirably reported, and in many instances embellished with able and copious notes by the reporter. These notes, many of them of considerable length, are especially valuable in these reports of the circuit courts, because they serve to call attention to and emphasize the cases in which there have been unfortunate differences of opinion among the judges of the various courts of the United States upon the same points of law. As many of these cases have never been brought before the United States Supreme Court, the curious anomaly is presented of the same court deciding the same point differently in different localities. It is certainly desirable that the judges of the circuit courts shall sit *in banco* at fixed times to settle their own differences of opinion; and we believe that some such measure has been proposed, and is under consideration at Washington.

This volume is well printed, carefully arranged, and has an excellent index. Besides Judge Dillon's own decisions, it contains some excellent ones of Judge Treat and Judge Krekel of Missouri, and of some of the other district judges of the Eighth Circuit.

Many of the cases reported are of interest to Eastern capitalists, and among them are a great number of suits brought by bond-holders against the various counties of Missouri which have endeavored somewhat fraudulently to avoid payment of their bonds. In some cases they appear to have done so successfully; but the court seems, wherever it can do so, to have held them to a strict fulfilment of their obligations.

Of the many cases of interest we can only refer to the following:—

*In re King*, p. 3, is one of the cases wherein doctors of law disagree. Judge DILLON decides, in accordance with the opinion of Judge LOWELL *In re Griffiths*, that the ninth section of the Bankrupt Act applies to pending cases at the time the amendment was enacted, as well as to cases begun thereafter. Judge BLATCHFORD, *In re Franke*, decided this point the other way.

*In Stillwell v. Home Insurance Co.*, p. 80, it is held that a policy of insurance against a total loss of the vessel's freight between St. Louis and New Orleans covers not only the freight list of goods on board at St. Louis, but also all additions received at various ports on the river to New Orleans, and also covers the actual loss of freight which would have been earned if the vessel had not been lost.

The case of *Brookmire v. Bean*, p. 136, establishes the right of a creditor, who had stipulated for a secret advantage, to prove his original debt in bankruptcy, when the composition had failed. In *Young v. Ridenbaugh*, p. 239, the court discusses with great ability the effect of the bankrupt's death upon pending bankruptcy proceedings.

In *Sullivan v. Union Pacific R.R. Co.*, p. 334, it is held, that, when a servant is killed on the spot by the wrongful act of the defendant, the master may recover for loss of service; and, where death does not immediately ensue, the master is not limited in the estimate of his damages to the period of the servant's death. In this case a minor child of the plaintiff was killed in the employ of the railroad, and suit is brought for loss of services till the age of twenty-one. The court discusses and does not follow the case of *Carey v. Berkshire R.R. Co.*, 1 Cush. 475, holding that that case followed a loose *obiter dictum* of Lord Ellenborough at *nisi prius*, and has no other authority. This important case has gone to the Supreme Court.

The rulings of Judges DILLON and TREAT in the celebrated "whiskey" cases are given at the end of the volume, and the charges to the jury in the cases against McKee and Babcock. They are interesting, but hardly worth the space given them in this volume.

## A LIST OF LAW BOOKS PUBLISHED IN ENGLAND AND AMERICA SINCE JULY, 1876.

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- Adams, Falt. *A Treatise on the Law of Trade-Marks.* 8vo, cloth, 7s. 6d. Butterworths, London.
- Addison, C. G. *A Treatise on the Law of Contracts.* Third American, from the seventh London edition. By James Appleton Morgan. Vol. 3. 8vo, sheep, \$7.50. James Cockcroft & Co., New York.
- Alabama Reports. Vol. 50. (Shepherd.) 8vo, sheep, \$6.50. Joel White, Montgomery.
- American Law Review. 1875-1876. Vol. 10. 8vo, sheep, \$6.00. Little, Brown, & Co., Boston.
- Arkansas Reports. Vol. 28. (Moore.) 8vo, sheep, \$6.00. Callaghan & Co., Chicago.
- Bateman, William O. *Political and Constitutional Law of the United States of America.* 8vo, sheep, \$3.50. G. I. Jones & Co., St. Louis.
- Brightley, F. C. *Annual Digest of the Laws of Pennsylvania for the Years 1878-1876.* Imperial 8vo, paper, \$2.50. Kay & Brother, Philadelphia.
- California Reports. Vol. 50. (Tuttle.) 8vo, sheep, \$5.00. A. L. Bancroft & Co., San Francisco.
- Connecticut Reports. Vol. 42. (Hooker.) 8vo, sheep, \$4.75. Hartford.
- Cracroft's *Trustee's Guide.* Twelfth edition. 8vo, cloth, 7s. 6d. Stanford, London.
- Desty, Robert. *Manual of Practice in the Courts of the United States.* Second edition. 18mo, sheep, \$3.00. Sumner Whitney & Co., San Francisco.
- Dicey, A. J. *A Treatise on the Rules for the Selection of the Parties to an Action; with Notes to American Cases.* By J. Henry Freeman. 8vo, sheep, \$7.50. James Cockcroft & Co., New York.
- Drewry, C. Stewart. *Forms of Claims and Defences in the Courts of the Chancery Division of the High Court of Justice.* Post 8vo, cloth, 9s. Butterworths, London.
- English Reports. Edited by Nathaniel C. Moak. Vol. 12. 8vo, sheep, \$6.00. William Gould & Son, Albany.
- Gautama, Institutes of. Edited by A. F. Stenzler. 8vo, 4s. 6d. Trübner & Co., London.
- Georgia Reports. Vol. 54. (Jackson.) 8vo, sheep, \$7.00. J. W. Burke & Co., Macon.
- Greenleaf, Simon. *A Treatise on the Law of Evidence.* Vol. 1. Thirteenth edition, carefully revised, with large additions. By John Wilder May. 8vo, sheep, \$6.00. Little, Brown, & Co., Boston.
- Hunter, W. A. *Systematic and Historical Exposition of Roman Law.* 8vo, cloth, 82s. 6d. Maxwell, London.
- Hurd, Rollin C. *A Treatise on the Right of Personal Liberty, and on the Writ of Habeas Corpus.* Second edition, with Notes by Frank H. Hurd. 8vo, sheep, \$7.50. W. C. Little & Co., Albany.

- Illinois Reports. Vol. 77. (Freeman.) 8vo, sheep, \$5.50. Springfield.
- Indiana Reports. Vol. 51. (Black.) 8vo, sheep, \$4.50. Indianapolis.
- Kansas Reports. Vol. 14. (Webb.) 8vo, sheep, \$6.00. Topeka.
- Leading Cases done into English. By an Apprentice of Lincoln's Inn. Post 8vo, 2s. 6d. Macmillan & Co., London.
- Mackenzie, Lord. Studies in Roman Law. Fourth edition. 8vo, cloth, 12s. Blackwood & Sons, London.
- Maryland Reports. Vol. 42. (Stockett.) 8vo, sheep, \$5.00. Baltimore.
- Massachusetts Reports. Vol. 114. (Browne.) 8vo, sheep, \$5.50. H. O. Houghton & Co., Cambridge.
- Minnesota Reports. Vol. 21. (Young.) 8vo, sheep, \$5.50. Soule, Thomas, & Wentworth, St. Louis.
- Mississippi Reports. Vol. 50. (Harris & Simrall, Vol. 2.) 8vo, sheep, \$6.00. Callaghan & Co., Chicago.
- Missouri Reports. Vol. 61. (Post.) 8vo, sheep, \$4.50. W. J. Gilbert, St. Louis.
- National Bankruptcy Register Reports. Vol. 14. 8vo, sheep, \$6.00. Campbell & Co., New York.
- Nebraska Reports. Vol. 4. (Brown.) 8vo, sheep, \$5.00. Mills & Co., Des Moines.
- New Jersey Equity Reports. Vol. 26. (Green, Vol. 9.) 8vo, sheep, \$5.00. Trenton.
- New York Reports. Abbott's Practice. New Series. Vol. 16. 8vo, sheep, \$5.00. Diossy & Co., New York.
- New York Superior Court Reports. Vol. 40. (Jones & Spencer, Vol. 8.) 8vo, sheep, \$6.00. Diossy & Co., New York.
- New York Supreme Court Reports. Vol. 14. (Hun, Vol. 7.) 8vo, sheep, \$3.00. Banks & Brothers, New York.
- Pennsylvania Reports. Vol. 78. (Smith.) 8vo, sheep, \$4.50. Kay & Brother, Philadelphia.
- Proffatt, John. Law of Private Corporations. 8vo, sheep, \$4.50. A. L. Bancroft & Co., San Francisco.
- Redfield, Isaac F. The Law of Wills, embracing Devises, Legacies, Parliamentary Trusts; their Construction, Discharge, and Mode of Enforcement. Vol. 2. Third edition, carefully revised and enlarged. 8vo, sheep, \$6.00. Little, Brown, & Co., Boston.
- Redman, J. H., & Lyon, G. E. A concise View of the Law of Landlord and Tenant. 8vo, cloth, 7s. 6d. Reeves & Turner, London.
- Rogers, R. J. Wrongs and Rights of a Traveller. 12mo, cloth, \$1.50. Sumner Whitney & Co., San Francisco.
- Shaw's Index to Session Laws of Minnesota. 8vo, sheep, \$4.00. John B. West, St. Paul, Minn.
- Smith, Josiah W. A Manual of Common Law. Seventh edition. 12mo, cloth, 14s. Stevens & Sons, London.
- Smith, William L. The Practice in Proceedings in the Probate Courts; with an Appendix of Practical Forms. Third edition. 8vo, sheep, \$2.50. Little, Brown, & Co., Boston.
- Stephen, James Fitzjames. A Digest of the Law of Evidence. Post 8vo, cloth, 6s. Macmillan & Co., London.
- Tennessee Reports. (Heiskell.) Vol. 8. 8vo, sheep, \$5.00. Tavel, Eastman, & Howell, Nashville.
- Texas Reports. Vol. 48. (Terrell & Walker.) 8vo, sheep, \$8.00. E. H. Cushing, Houston.

- Vincent, C. E. Howard. *Law of Criticism and Libel*. 12mo, cloth, 2s. 6d. E. Wilson, London.
- Wild, Edward N. *Journal Entries under the Codes of Civil and Criminal Procedure of the State of Ohio*. 8vo, sheep, \$3.50. Robert Clarke & Co., Cincinnati.
- Williams, Joshua. *Principles of the Law of Personal Property*. Ninth edition. 8vo, cloth, 21s. Henry Sweet, London.
- Williams, R. J. & W. V. *Law and Practice of Bankruptcy*. Second edition. 8vo, 28s. Stevens & Sons, London.
- Wisconsin Reports. . Vol. 39. (Conover.) 8vo, sheep, \$5.00. Callaghan & Co., Chicago.

## SUMMARY OF EVENTS.

## UNITED STATES.

**SUPREME COURT. — VALIDITY OF COUNTY AND TOWN BONDS.** — There were argued and submitted to the Supreme Court at the last term a comparatively large number of cases involving the question of the validity of bonds issued by counties and towns in certain of the Western States in aid of railroads. The condition of things disclosed by the cases, and the opinions of the court, may well lead the investor to believe that his securities are such only in name. In two of the cases — *Marcy v. Township of Oswego*, and *Humboldt Township v. Long* — the bonds in question were issued under an act of the legislature of Kansas, the plain purpose of which was to check the tendency to reckless expenditure on the part of cities and towns by a scheme of restrictions, which to the authors of the act, at any rate, must have seemed ample; and the issue was in plain violation of some of the terms of the act. The majority of the court, however (for there was a strong dissenting opinion), have sustained the bonds by what seems like an extreme construction.

In *Marcy v. Township of Oswego* it appeared that the bonds were issued in strict compliance with the act, except that they were in excess of the amount authorized; and the question was, whether, in a suit by a *bona fide* holder for value, it could be shown in defence that the value of the taxable property of the township was not sufficient to authorize the issue. In delivering the opinion of the majority of the court, Mr. Justice STRONG says, —

“To solve this question, there are some facts appearing in the case which it is necessary to consider. The bonds to which the coupons were attached contained the following recital: ‘This bond is executed and issued by virtue of, and in accordance with, an act of the legislature of the said State of Kansas, entitled “An Act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved Feb. 25, 1870,” and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said township of Oswego, at a special election duly held on the seventeenth day of May, A. D. 1870.’ Each bond also declared that the board of county commissioners of the county of Labette (of which county the township of Oswego is a part) had caused it to be issued in the name and in behalf of said township, and to be signed by the chairman of the said board of county commissioners, and attested by the county clerk of the said county, under its seal. Accordingly, each bond was thus signed, attested, and sealed. Nor is this all. The bonds were registered in the office of the State auditor, and certified by him in accordance with the provisions of an act of the legislature. His certificate on the back of each bond declared that it had been regularly and legally issued; that the signatures thereto were genuine; and that it had been duly registered in accordance with the act of the legislature.

“In view of these facts, and of the decisions heretofore made by this court, the first question certified to us cannot be considered an open one. We have recently



reviewed the subject in the case of *The Town of Coloma v. Eaves*, and reasserted what had been decided before; namely, that where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their decision is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive. And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds has been conditionally granted.

"Applying this settled rule to the present case, it is free from difficulty. The act of the legislature under which the bonds purport to have been issued was passed Feb. 25, 1870. Laws of Kansas, 1870, p. 189. The first section enacted, that whenever fifty of the qualified voters, being freeholders, of any municipal township in any county, should petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock in the name of such township in any railroad proposed to be constructed into or through the township, designating in the petition (among other things) the amount of stock proposed to be taken, it should be the duty of the board to cause an election to be held in the township to determine whether such subscription should be made; provided that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent per annum on the taxable property of such township to pay the yearly interest.

"The second section directed the board of county commissioners to make an order for holding the election contemplated in the preceding section, and to specify therein the amount of stock proposed to be subscribed, and also to prescribe the form of the ballots to be used.

"The fifth section enacted, that, if three-fifths of the electors voting at such election should vote for the subscription, the board of county commissioners should order the county clerk to make it in the name of the township, and should cause such bonds as might be required by the terms of the vote and subscription to be issued in the name of such township, to be signed by the chairman of the board, and attested by the clerk, under the seal of the county.

"These provisions of the legislative act make it evident not only that the county board was constituted the agent to execute the power granted, but that it was contemplated the board should determine whether the facts existed, which, under the law, warranted the issue of the bonds. The board was to order the election if certain facts existed, and only then. It was required to act if fifty freeholders who were voters of the township petitioned for the election; if the petition set out the amount of stock proposed to be subscribed; if that amount was not greater than the amount to which the township was limited by the act; if the petition designated the railroad company; if it pointed out the mode and terms of payment. Of course the board, and it only, was to decide whether these things precedent to the right to order an election were actual facts. No other tribunal could make the determination, and the members of the board had peculiar means of knowledge beyond what any other persons could have. Moreover, these decisions were to be made before they acted, not after the election and after the bonds had been issued.

"The order for the election, then, involved a determination by the appointed authority that the petition for it was sufficiently signed by fifty freeholders who were

voters ; that the petition was such a one as was contemplated by the law ; and that the amount proposed by it to be subscribed was not beyond the limit fixed by the legislature.

" So, also, the subsequent issue of the bonds containing the recital above quoted, that they were issued ' by virtue of and in accordance with ' the legislative act, and in ' pursuance of and in accordance with the vote of three-fifths of the legal voters of the township, ' was another determination, not only of the result of the popular vote, but that all the facts existed which the statute required in order to justify the issue of the bonds.

" It is to be observed that every prerequisite fact to the execution and issue of the bonds was of a nature that required examination and decision. The existence of sufficient taxable property to warrant the amount of the subscription and issue was no more essential to the exercise of the authority conferred upon the board of county commissioners than was the petition for the election, or the fact that fifty freeholders had signed or that three-fifths of the legal voters had voted for the subscription. These are all extrinsic facts, bearing not so much upon the authority vested in the board to issue the bonds as upon the question whether that authority should be exercised. They are all, by the statute, referred to the inquiry and determination of the board ; and they were all determined before the bonds and coupons came into the hands of the plaintiff. He was, therefore, not bound, when he purchased, to look beyond the act of the legislature and the recitals which the bonds contained. It follows that the question certified to us should be answered in the negative."

In *Humboldt Township v. Long*, a further question was raised, " whether the bonds were invalid because of the fact that the election was held within less than thirty days after the day of the order calling for it." The court held that the rule laid down in *Marcy v. Oswego* applied ; that

" The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power. Whether that step had been taken or not, whether the election had been regularly conducted with sufficient notice, and whether the requisite majority of votes had been cast in favor of a subscription and consequent bond issue, were questions which the law submitted to the board of county commissioners, and which it was necessary for them to answer before they could act. In the present case, the board passed upon them, and issued the bonds, asserting by the recitals that they were issued ' in pursuance of and in accordance with the act of the legislature. ' Thus the plaintiff below took them without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments."

The dissenting opinion of Mr. Justice MILLER (in which Mr. Justice DAVIS and Mr. Justice FIELD concurred) is as follows :—

" We have had argued and submitted to us during the present term some ten or twelve cases involving the validity of bonds issued in aid of railroads by counties and towns in different States.

" They were reserved for decision until a late day in the term ; and, the opinions having been delivered in all of them within the last few weeks, I have waited for what I have thought proper to say by way of dissent to some of them until the last of these judgments are announced, as they have been to-day.

"I understand these opinions to hold, that when the constitution of the State or an act of its legislature imperatively forbids these municipalities to issue bonds in aid of railroads or other similar enterprises, all such bonds issued thereafter will be held void; but, if there exists any authority whatever to issue such bonds, no restrictions, limitations, or conditions imposed by the legislature in the exercise of that authority can be made effectual if they be disregarded by the officers of those corporations.

"That such is the necessary consequence of the decision just read, in the cases from the State of Kansas, is too obvious to need argument or illustration. That State had enacted a general law on the subject of subscriptions by counties and towns to aid in the construction of railroads, in which it was declared that no bonds should be issued on which the interest required an annual levy of a tax beyond one per cent of the value of the taxable property of the municipality which issued them.

"In the case under consideration, this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds and of the taxable property of the towns is given in these cases with exactness; but I do know, that, in some of the cases tried before me last summer in Kansas, it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town, as shown by the tax-list of the year preceding the issue.

"This court holds that such a showing is no defence to the bonds, notwithstanding the express prohibition of the legislature. It is therefore clear, that, so long as this doctrine is upheld, it is not in the power of the legislature to authorize these corporations to issue bonds under any special circumstances, or with any limitation in the use of the power, which may not be disregarded with impunity. It may be the wisest policy to prevent the issue of such bonds altogether; but it is not for this court to dictate a policy for the States on that subject.

"The result of the decision is a most extraordinary one. It stands alone in the construction of powers specifically granted, whether the source of the power be a State constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual. It establishes, that of all the classes of agencies, public or private, whether acting as officers whose powers are created by statute or by other corporations or by individuals, and whether the subject-matter relates to duties imposed by the nation, or the state, or by private corporations, or by individuals, on this one class of agents, and in regard to the exercise of this one class of powers alone, must full, absolute, and uncontrollable authority be conferred on them, or none. In reference to municipal bonds alone, the law is, that no authority to issue them can be given which is capable of any effectual condition or limitation as to its exercise.

"The power of taxation, which has repeatedly been stated by this court to be the most necessary of all legislative powers, and least capable of restriction, may by positive enactments be limited. If the constitution of a State should declare that no tax shall be levied exceeding a certain per cent of the value of the property taxed, any statute imposing a larger rate would be void as to the excess. If the legislature should say that no municipal corporation should assess a tax beyond a certain per cent, the courts would not hesitate to pronounce a levy in excess of that rate void.

"But, when the legislature undertakes to limit the power of creating a debt by these corporations which will require a tax to pay it in excess of that rate of taxation, this court says that there is no power to do this effectually. No such principle has ever been applied by this court, or by any other court, to a State, to the United States, to private corporations, or to individuals. I challenge the production of a case in which it has been so applied.

"In the *Floyd Acceptance Cases*, 7 Wall. 666, in which the Secretary of War had

accepted time-drafts drawn on him by a contractor, which, being negotiable, came into the hands of *bona fide* purchasers before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think for a moment of holding that a power of attorney made by an individual cannot be so limited as to make any one dealing with the agent bound by the limitation, or that the agent's construction of this power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his authority, when that authority is express, is open and notorious, bind the corporation which he professes to represent.

"The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the frauds of municipal officers. It is, that, wherever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with; and, especially and particularly if they make a *false recital* of the fact on which the power depends in the paper they issue, this false recital has the effect of creating a power which had no existence without it.

"This remarkable result is always defended on the ground that the paper is negotiable, and the purchaser is ignorant of the falsehood. But in the *Floyd Acceptance Cases* this court held, and it was necessary to hold so there, that the inquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable; and that, if no such authority existed, it could not be aided by giving the paper that form. In county bond cases it seems to be otherwise.

"In that case the court held that the party taking such paper was bound to know the law as it affected the authority of the officer who issued it. In county bond cases, while this principle of law is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express provisions, is still valid.

"There is no reason, in the nature of the condition on which this power depends in these cases, why any purchaser should not take notice of its existence before he buys. The bonds in each case were issued at one time, as one act, of one date, and in payment of one subscription. All this was a matter of record in the town where it was done.

"So, also, the valuation of all the property of the town for the taxation of the year before the bonds were issued is of record both in that town and in the office of the clerk of the county in which the town is located. A purchaser had but to write to the township clerk or the county clerk to know precisely the amount of the issue of bonds and the value of the taxable property within the township. In the matter of a power depending on these facts, in any other class of cases, it would be held, that, before buying these bonds, the purchaser must look to those matters on which their validity depended.

"They are public, all open, all accessible, — the statute, the ordinance for their issue, the latest assessment-roll. But, in favor of a purchaser of municipal bonds, all this is to be disregarded; and a debt contracted without authority, and in violation of express statute, is to be collected out of the property of the helpless man who owns any in that district.

"I say helpless advisedly, because these are not *his* agents. They are the officers of the law, appointed or elected without his consent; acting contrary, perhaps, to his wishes. Surely, if the acts of any class of officers should be valid only when done

in conformity to law, it is those who manage the affairs of towns, counties, and villages, in creating debts which not they, but the property-owners, must pay.

"The original case on which this ruling is based is *Knox County v. Aspinwall*, 21 How. 544. It has, I admit, been frequently cited and followed in this court since then; but the reasoning on which it was founded has never been examined or defended until now. It has simply been followed. The case of *The Town of Coloma v. Eaves*, decided a few days ago, is the first attempt to defend it on principle that has ever been made. How far it has been successful I will not undertake to say. Of one thing I feel very sure: that if the English judges who decided the case of *The Royal British Bank v. Torquand*, on the authority of which *Knox County v. Aspinwall* was based, were here to-day, they would be filled with astonishment at this result of their decision.

"The bank in that case was not a corporation. It was a joint-stock company in the nature of a partnership. The action was against the manager as such, and the question concerned his power to borrow money. This power depended, in this particular case, on a resolution of the company. The charter, or deed of settlement, gave the power; and, when it was exercised, the court held that the lender was not bound to examine the records of the company to see if the resolution had been legally sufficient.

"This was a private partnership. Its papers and records were not open to public inspection. The manager and directors were not officers of the law, whose powers were defined by statute; nor was the existence of the condition on which the power depended to be ascertained by the inspection of public and official records made and kept by officers of the law for that very purpose. In all these material circumstances, that case differed widely from those now before us. It is easy to say, and looks plausible when said, that, if municipal corporations put bonds on the market, they must pay them when they become due; but it is another thing to say, that when an officer, created by law, exceeds the authority which that law confers upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he had no part whatever in their issue, and no power to prevent it.

"The latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issuing of the bonds was not the act of the corporation. It is a false assumption to say that the corporation put them on the market. If one of two innocent persons must suffer for the unauthorized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose rather than the property-holder, who might not have known any thing about the matter, or, if he did, had not power to prevent the wrong."

In *Hartman v. Bates Co.*, the bonds were issued by Bates County, Missouri, at the instance and on account of Mt. Pleasant Township, in payment of a subscription to the stock of the Lexington, Lake, and Gulf R.R. Co. The subscription was under the "Township Aid Act," which provided, that, on the application of "twenty-five tax-payers and residents of any township," the county court might order an election to be held in such township to determine whether a subscription to any railroad to be built in or near the township should be made, and, on the vote of "two-thirds of the qualified voters of the township voting at such election," should make the subscription, and issue bonds in payment, if they were proposed. It was contended that this act was repugnant to § 14, art. 11, of the Constitution of Missouri, adopted in 1865, which

provides that "the general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." The court says, —

"If the constitutional restriction extends by implication to townships as well as to counties, cities, and towns, an election not conforming to the requirements of the constitution would be invalid, and confer no authority to make a subscription. The petition in this case only alleges that two-thirds of the qualified voters voting at the election voted in favor of the subscription, which does not satisfy the demands of the constitution. The question, therefore, arises, whether townships are within the restriction of the constitutional provision. A township is a different thing from a town, in the organic law of Missouri; the latter being an incorporated municipality, the former only a geographical subdivision of a county. . . . It forms an integral part of the county; and the county, to a certain extent, controls and acts for it. . . . That the framers of the constitution intended to require the assent of two-thirds of all qualified voters of a 'county, city, or town,' as a prerequisite to a subscription to a railroad or other company, and did not intend the same thing with regard to townships, seems almost absurd. . . . It cannot be possible that it was intended to restrict the legislature as to counties, and not to restrict it as to mere sectional portions of counties. . . . If the legislature could clothe these geographical portions of a county with power to subscribe to stock companies at all, it certainly could not set at nought the constitutional requirement of the people's consent thereto."

Of course, the decision could not have been otherwise. It seems likely, however, to be attended by unexpected and most disastrous results. The entire township indebtedness may be estimated, says the *Missouri Republican*, "at 3,300,000 dollars, all of which is dissipated into thin air by the court's decision. The people of Bates, Cass, Jackson, Johnson, and Lafayette, certainly take this view; and there is as much rejoicing in that part of the State over the decision as though some great blessing had suddenly descended on the people. It destroys nearly all the Cass County debt, one-third of the Lafayette County debt, two-thirds of Marion County, and nearly one-third that of Pike County." The English journals have already made the case the text of a warning to foreign investors.

**IMPEACHMENT. — BELKNAP'S CASE.** — On the first day of August, the Senate proceeded to vote on the articles of impeachment in this case. The vote stood as follows: On the first article, 85 guilty, 25 not guilty; on the second, 86 guilty, 25 not guilty; and on the third, 87 guilty, 25 not guilty; and the defendant was acquitted. All but one or two of the senators voting not guilty put their votes on the ground that the Senate had no jurisdiction to try the case. The result, of course, is a sufficiently deplorable one. Undoubtedly, so far as Belknap himself is concerned, he is practically as completely disqualified from holding "any office of honor, trust, or profit, under the United States," as he would have been if the decision had been the other way. But the manner in which a proceeding of such moment has been conducted, and the disagreement as to its proper scope, not only impair the dignity of the procedure itself, but must tend to destroy the security against official misconduct which it is meant to provide.

On the main question, whether or not the Senate had jurisdiction, we have already expressed our views. Regarding the new question, whether, a majority of the Senate having decided that the Senate had jurisdiction, that point is any longer open, we think there can be little doubt. Whether Belknap was guilty or not guilty is one question: whether the Senate had jurisdiction to try that question is quite another. The Senate having assumed jurisdiction, every member of the Senate, in our opinion, was bound by that decision; and every senator who voted on the issue of guilt or innocence, in fact, assented to it. If the Senate had no jurisdiction to try that issue, no senator had a right to vote on it; and the only course logically open to those who denied the jurisdiction was to take no part in the proceedings. To vote was an assertion of the right to vote, an exercise of jurisdiction.

The course of the senators who voted not guilty, because they had no right to vote at all, was, therefore, logically indefensible, and in its tendency as pernicious as would be the example of a dissenting judge who should refuse to enforce the judgment of a majority of the court because he did not concur with the views of his brethren.

The case establishes the peculiar doctrine, that resignation is in law no bar to an impeachment, but may be relied upon in practice to insure an acquittal.

**PRIVILEGED COMMUNICATION.** — The following correspondence, which is of interest as regards the relations between the Executive and the heads of the departments and the character of the communications between them, has passed between the President and Mr. Bristow: —

“EXECUTIVE MANSION, WASHINGTON, July 12, 1876.

“*To Hon. B. H. Bristow.*

“DEAR SIR, — Through the press I learn that the committee of Congress investigating whiskey frauds have summoned you as a witness, and that you, with great propriety as I think, have declined to testify, claiming that what occurred in cabinet, or between a member of the cabinet and the Executive, officially, is privileged, and that a committee of Congress have no right to demand answer.

“I appreciate the position you have assumed on this question, but beg to relieve you from all obligation of secrecy on this subject, and desire not only that you may answer all questions asked relating to it, but wish that all members of my cabinet, and ex-members of the cabinet since I have been President, may also be called upon to testify in regard to the same matter.

“With great respect, your obedient servant,

“U. S. GRANT.”

“NEW YORK, July 13, 1876.

“MR. PRESIDENT, — I have the honor this moment to receive your letter of yesterday, in which, referring with approval to my refusal to testify before a committee of the House of Representatives to what occurred between the President and myself while I held the office of Secretary of the Treasury, you are pleased to add that you wish to relieve me from all obligations of secrecy, and to express your desire that all members of your cabinet may be called upon to testify fully.

“When I appeared before the committee last week in obedience to their summons, I refused to answer any and all questions which required me to state any conversation between you and myself touching official matters, whether such conversation took place at a meeting of the cabinet or at any time; saying, however, to the com-

mittee, that no inference adverse to any one should be drawn from my refusal to answer their questions. I took the position distinctly, that I considered all conversations between the President and heads of the departments on official matters confidential and privileged, and that the privilege existed not so much for the protection of the parties immediately concerned as for the interest of the public service. If I was right in this view of the matter, it would seem to follow that the privilege cannot be waived by either or both of the parties. Indeed, I said to the committee that I should not feel at liberty to answer their questions with your consent. Although I have had no opportunities to examine authorities on this subject, I am still of the opinion that the public duty to treat such conversations as confidential and privileged is not removed or modified by your consent that I should make a full answer to the questions. If the privilege were merely personal, it might be waived; but I place it on higher grounds. I respectfully suggest that the appearance of the several heads of departments before a committee of Congress, to testify to conversations between the President and themselves running through a period of many months, would almost inevitably lead to the disclosure of differences of recollection, and present to the country an unseemly conflict to which I would not willingly be a party. Besides, it seems to me that such an inquiry by a committee of Congress tends to the absorption, if not to the complete destruction, of executive power, and to the establishment of a purely legislative government. In any view I am able to take, it seems to me that duty requires me to adhere to my announced purpose, — not to answer the questions propounded to me by the committee.

"I beg to remind you that my opinion on the subject was repeatedly stated to you and the members of your cabinet, and, as I understood, met your and their approval. My withdrawal from the cabinet does not alter or modify my duty in this respect, nor have my own views undergone any change. I hope I shall not be recalled by the committee; but, should they see proper to call me again, I cannot consent, as at present advised, to testify to conversations held with the President on official business.

"With great respect, I am your obedient servant,

"B. H. BRISTOW."

There is no doubt on the authorities that communications between the President and members of his cabinet on State affairs may be privileged for reasons of public policy; and it would seem that ordinarily the head of the department would, as between himself and the court, be entitled, in the first instance, to decide whether reasons of state forbade the disclosure of the matters inquired of. In the matter referred to in the above correspondence, however, the letter of the President, of course, means that in his opinion there was no reason of public policy requiring the matters asked about to be kept secret: so that the question is distinctly raised, whether Mr. Bristow would have been entitled, after the President's letter, to refuse to answer the questions put to him; in other words, whether the President or Mr. Bristow is to judge of what is privileged matter, or whether both may.

Mr. Bristow probably states the case too roundly when he says that both together could not waive the privilege. That would result logically in the proposition that no communications in the cabinet touching state affairs could be inquired into, whether it was important to keep them secret or not; in which case the court must apply the rule, either by refusing to allow any questions touching such matters to be put, or by directing the witness not to answer them.



**BANKRUPT ACT.**—The way of the bankrupt has been made still easier by the passage of an amendment to the law (approved July 28, 1876), which provides —

“That sect. 12 of said act be, and the same is hereby, amended as follows: After the word ‘committed,’ in line forty-four, insert: ‘Provided, also, that no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratably and without creating any preference, and valid according to the law of the State where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors.’ That sect. 5108 of the Revised Statutes is hereby amended so as to read as follows: ‘At any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced.’”

Congress adjourned Wednesday, Aug. 16.

### CALIFORNIA.

**CIVIL RIGHTS ACT.**—According to the *Alta Californian*, SAWYER, J. (U. S. Circuit Court), has held that that part of the Civil Rights Act which makes it a misdemeanor for any manager of a theatre, or other place of public amusement, to refuse admission to any one on account of color, is unconstitutional. The court says, —

“Congress has no power to make such a law; though the legislature of any State might, perhaps, do so. The management of a theatre is a private enterprise: the proprietor conducts it for his own profit: it is his investment, and he can lay down the laws by which it shall be conducted, and the public has nothing to do with it. If the defendant had sold a ticket, and agreed to let the buyer in, he would be liable to an action for damages, and such a suit might legally be brought. In the case as it stands, however, it is beyond the power of Congress to rule as it has in passing the act; and so much of the Fourteenth Amendment as applies to such cases is unconstitutional and void, and there is no ground on which this indictment can be sustained.”

The prosecution gave notice that the case would be appealed to the United States Supreme Court.

### ILLINOIS.

**CONTEMPT OF COURT.**—*Storey v. The People.*—It will be remembered that in March, 1875, the grand jury for Cook County returned against Storey, who was then the editor of a newspaper, three indictments for libel, and one for publishing an obscene newspaper. Thereupon there appeared in Storey's paper a series of violent and abusive articles, attacking the integrity of the jury as a body, and the characters of its individual members. The jury appealed to the court for protection. Storey was called before the court, and committed to jail for contempt. An application was made to the Supreme Court in his behalf, and he was discharged on bail. It appears from the case before the

Supreme Court that all the indictments against Storey had been returned before the publication of the articles complained of; and that, at the time of their publication, Storey had no knowledge or belief that there were any other complaints pending against him. There did not appear to be any allegation that the publication was calculated to prevent the obtaining a competent petit jury to try the indictments, or that the presiding judge would be affected thereby. The only question then was, assuming the articles to be libellous, whether the publication of a libel on a grand jury because of an act already done may be summarily punished as contempt. The court hold that it cannot. After citing *The Queen v. Lefroy*, 8 Q. B. 134, — where it is said the superior courts “were carved out of the one supreme court, and were all divisions of the *aula regis*, where it is said the king in person dispensed justice, and their power of committing for contempt was an emanation of the royal authority, for any contempt of the court would be a contempt of the sovereign,” — the opinion proceeds: —

“The theory of government requiring royalty to be invested with an imaginary perfection, which forbids question or discussion, is diametrically opposed to our theory of popular government, in which the utmost latitude and freedom in the discussion of business affecting the public, and the conduct of those who fill positions of public trust, that is consistent with truth and decency, are not only allowable, but essential to the public welfare.

“The common-law mode of proceeding in cases of contempt presents no question of fact to be tried by a jury. The defendant determines by his own answer, under oath, whether he is guilty of that which is charged against him as a contempt of court; and, if he fails thereby to purge himself, the court may at once impose the punishment.

“The law of libel at common law left the jury to determine whether the defendant was guilty of the publication alone; but the question of whether the publication was libellous was for the court, and it was admissible to show by evidence that the publication was true, or the motive with which the publication was made. Whether, therefore, the party charged with the libel was tried by a jury, or proceeded against summarily as for contempt, the only question of fact was, whether he was guilty of the publication.

“In this State, however, our constitution guarantees ‘that every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and justifiable ends, shall be a sufficient defence.’

“This language, plain and explicit as it is, cannot be held to have no application to courts, or those by whom they are conducted. The judiciary is elective; and the jurors, although appointed, are, in general, appointed by a board whose members are elected by popular vote. There is, therefore, the same responsibility, in theory, in the judicial department, that exists in the legislative and executive departments, to the people for the diligent and faithful discharge of all duties enjoined on it; and the same necessity for public information with regard to the conduct and character of those intrusted to discharge those duties, in order that the elective franchise shall be intelligently exercised, as obtains in regard to the other departments of the government.

“When it is conceded that the guaranty of this clause of the constitution extends to words spoken or published in regard to judicial conduct and character, it would seem necessarily to follow that the defendant has the right to make a defence

which can only be properly tried by a jury, and which the judge of a court, especially if he is himself the subject of the publication, is unfitted to try.

"Entertaining these views, the judgment of the court below must be reversed, and the respondent discharged."

The case seems pre-eminently one in which, if the court is satisfied, no one else need cry out. We may be permitted, however, to hope, that, in case Mr. Storey sees fit to comment further on the matter, he will at least change the manner of his discourse.

## IOWA.

**SUITS AGAINST RECEIVERS.** — The fact that a great many railroads are at present operated by receivers has naturally given prominence to the question, whether such receivers are liable to suit in courts other than those appointing them, at least without leave first had from the court appointing; and not unnaturally has given rise to some diversity of opinion. In *Allen v. Central R.R. Co. of Iowa*, the plaintiff was wrongly ejected from the defendant's cars, and brought his action for damages against the company in the State court. It appeared that a receiver had been appointed by the Circuit Court of the United States, under an order directing that the receiver "take full charge of all the property, income, profits, earnings, and receipts of said Central Railroad Company of Iowa; and that the said receiver pay out of the income, receipts, and earnings of the road no debts or expenses of any kind, without special order, of which plaintiff shall have notice, except such as shall become due, belong to, and come within the category and character of operating expenses of the said road:" and the court below ruled that the action could not be maintained, leave to bring it not having been obtained from the Circuit Court. On appeal, the Supreme Court, as to the question whether or not leave should have been obtained, say, —

"In *Kinney v. Crocker, Receiver*, 18 Wis. 74, which was an action to recover of defendant, who was in possession of and operating a railroad as a receiver, under the orders of the United States District Court, for injuries occasioned to the plaintiff by the alleged negligence of the agents and servants of defendant in operating a train of cars, it was held that the court below properly refused to instruct the jury, that, unless the plaintiff had leave from the United States District Court to bring the suit, he could not recover. In this case, whilst it was admitted 'that a court of equity will, on a proper application, protect its own receiver, when the possession which he holds under the authority of the court is sought to be disturbed,' and that a plaintiff 'desiring to prosecute a legal claim for damages against a receiver might, in order to relieve himself from the liability to have his proceedings arrested by an exercise of this equitable jurisdiction, very properly obtain leave to prosecute,' yet it was held that 'his failure to do so is no bar to the jurisdiction of the court of law, and no defence to an otherwise legal action on the trial;' and the court say, 'There can be no room to question this conclusion in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of the Court of Chancery, but only an attempt to obtain a judgment at law on a claim for damages.' This case, in our opinion, announces the correct doctrine. See also *Paige v. Smith*, 99 Mass. 895; *Hills v. Parker*, 111 Mass. 508; *Camp v. Barney*, 11 N. Y. 878.

"In all of these cases, the action was brought against the receiver; but if, in such case, it is not necessary to obtain authority, to commence the action, of the court appointing the receiver, *a fortiori* is it not necessary to obtain such authority when the action is against the railroad company itself."

In the United States Circuit Court at St. Louis, however, on motion of the receivers of the Pacific Railroad, the plaintiff, who had brought suit in the State court, and obtained an injunction restraining them, as receivers, from proceeding to her damage with certain work in the street adjoining her premises, was enjoined from further proceeding in the State court; the court saying, "One court having custody of property through its receivers cannot admit that another court has power to define what are their duties with reference to such property. To admit such a principle would be to permit other tribunals to instruct our receivers in regard to their duties, and to surrender control over them to the numerous courts within whose jurisdiction they are required to act." Indeed, according to a note in the *Central Law Journal*, Judge DILLON refused the writer leave to bring an action for damages in the State court against the receiver of the Central Railroad of Iowa.

The cases cited from Massachusetts are very far from maintaining the proposition in support of which they are referred to. In *Paige v. Smith*, the decision went on the ground that the courts of Vermont, in which State the defendants had been appointed, having decided that it was no defence that they were receivers, the courts of Massachusetts would not go behind that decision; and in *Hills v. Parker*, which was an action of replevin, the question simply was, whether the defendants were entitled to the property in dispute in any capacity.

## KANSAS.

USURY UNDER NATIONAL BANK ACT. — ASSIGNEE IN BANKRUPTCY. — In *Crocker, Assignee, v. First National Bank of Chetopa* (United States Circuit Court), the assignee sued to recover twice the amount of interest taken from the bankrupts by the defendants, the interest charged by the defendants being at a greater rate than is allowed by the laws of Kansas. The court (DILLON, J.) held that the recovery should be for double the whole amount of interest paid, and not merely for double the amount in excess of the legal rate under the law of the State. On the question, whether the right of action which the bankrupts had passed to their assignee, the plaintiff, the opinion continues: —

"The next question is, *Is the assignee in bankruptcy their 'legal representative' within the meaning of the statute?* Rev. Stat. sect. 5198. It is our opinion that an assignee in bankruptcy is, in respect of such a claim as this, which has injuriously affected and reduced the estate in bankruptcy, and which is to be enforced 'by an action in the nature of an action of debt,' peculiarly and most appropriately 'the legal representative' of the bankrupt. Every reason which, in case of the death of the debtor without bankruptcy, would give the right of action to the administrator or executor as his legal representative, applies with full force to the assignee in bankruptcy, if his estate is, during his lifetime, administered in a court of bankruptcy. See *Tiffany v. Nat. Bank of Mo.*, *supra*; 1 Deac. on Bank. (8d ed.) 528, 524; *Beckham v. Drake*, 2 H. L. Cas. 640.

"In this view, it is unnecessary to determine whether the right of action would vest in the assignee under the Bankrupt Act (Rev. Stat. sects. 5044-5047); though it seems not improbable that the provisions of these sections are comprehensive enough to embrace it. *Darby's Trustees v. Boatmen's Sav. Inst.*, 1 Dill. 141; s. c. 18 Wall. 375.

"Under the English Bankrupt Act, no right of action passes to the assignee for a mere personal tort to the bankrupt, as for assault or libel; but it is otherwise in respect of injuries or torts which result in diminishing the estate of the bankrupt; and the distinction is taken between rights of action where personal suffering or inconvenience is the primary cause of the action (which do not pass), and where pecuniary loss or damage is the primary cause of action (which do pass). 1 Deac. on Bank. (8d ed.) 522 *et seq.* This distinction seems to be made in our Bankrupt Act, which vests in the assignee all such 'rights of action.'"

### MASSACHUSETTS.

**NEGLIGENCE. — CHARITABLE INSTITUTION.** — The rule as to the liability of commissioners of public works for negligence, where there has been no fault on their part in the choice or appointment of those who were to perform the work, has received a new application in *McDonald v. The Massachusetts General Hospital*. The defendants are a public charitable institution, incorporated for the purpose of erecting, supporting, and maintaining a general hospital for sick and insane persons. Their funds are derived from gifts from the Commonwealth, from gifts, devises, and bequests of benevolent persons, and from a portion of the profits of the Massachusetts Hospital Life Insurance Co. and of certain other insurance companies, to be paid over to the defendants according to the terms of their several charters. Patients of means are expected to pay according to their circumstances and the accommodations they receive, though the benefits of the hospital are administered at as low a rate as practicable; but there are also furnished from the funds of the hospital, and from gifts and bequests especially for that purpose, a certain number of "free beds." The trustees have authority to determine who shall be admitted as patients.

The treatment of all cases in the hospital is by the visiting physicians and surgeons, who act gratuitously, and the house pupils acting under their direction. Such physicians and surgeons are practitioners in the city of Boston, outside of the hospital, and are selected by the trustees to treat patients who come to the hospital for gratuitous treatment. The house pupils are chosen by the trustees from a "list of applicants qualified for the service, to be nominated by the visiting physicians and surgeons."

It appeared that the plaintiff, on Dec. 9, 1870, fell from a building and broke his thigh-bone, and that he was brought the same day to the defendants' hospital for treatment. While there he occupied a "free bed," and received gratuitously the surgical care and nursing which the hospital affords to its patients. The house pupil who set the broken bone and attended to the case during the plaintiff's stay had been recommended by the attending physicians and surgeons, and appointed as provided in the by-laws; and the visiting surgeon under whose direction the pupil acted, was a man of the highest professional reputation.

The plaintiff alleged that the fractured bone had not been properly set,

either by reason of the incompetency or negligence of the pupil, or of the negligence of the surgeon ; and that, in consequence, he was permanently disabled. DEVENS, J., in his opinion, says, —

“The corporation has no capital stock, no provision for making dividends or profits ; and whatever it may receive from any source it holds in trust, to be devoted to the object of sustaining the hospital, and increasing its benefits to the public by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public and private charity. Its affairs are conducted for a great public purpose, — that of administering to the comfort of the sick, — without any expectation on the part of those immediately interested in the corporation of receiving any compensation which will inure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity. *Jackson v. Phillips*, 14 Allen, 589. The fact that its funds are supplemented by such amounts as it may receive from those who are able to pay wholly or entirely for the accommodation they receive does not render it the less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence. *Gooch v. Association for Relief of Aged Females*, 109 Mass. 568. Nor does the fact that the trustees through their agents are themselves to determine who are to be the immediate objects of the charity, and that no person has individually a right to demand admission to its benefits, alter its character. All cannot participate in its benefits. The trustees are those to whom is confided the duty of selecting those who shall enjoy them, and prescribing the terms upon which they shall do so. If this trust is abused, the trustees are under the superintending power of this court, as a court of equity, by virtue of its authority to correct all such abuses ; and the interest of the public therein — that is to say, of the indefinite objects of the charity — may be represented by the Attorney-General. *Sanderson v. White*, 18 Pick. 820 ; *Attorney-General v. Old South Society*, 13 Allen, 474.

“It might well be questioned whether any contract could be inferred between the plaintiff and defendant. It has offered to him freely those ministrations, which, as a dispenser of a public charity, it has been able to provide for his comfort ; and he has accepted them. It has no funds which can be charged with any judgment which he might recover, except those which are held subject to the trust of maintaining the hospital. If, however, any contract can be inferred from the relation of the parties, it can be only on the part of the corporation that it shall use due and reasonable care in the selection of its agents. Where actions have been brought against commissioners of public works serving gratuitously for negligence in carrying on the work by which injury has occurred, it has been held that they were not liable, if proper care had been used by them in selecting those who were actually to perform the work. *Halliday v. Vestry and Parish of St. Leonard*, 11 C. B. n. s. 192. The liability of this defendant corporation can extend no farther than this : if there has been no neglect on the part of those who administer the trust and control its management, and if due care has been used by them in the selection of their inferior agents, even if injury has occurred by the negligence of such agents, it cannot be made responsible. The funds intrusted to it are not to be diminished by such casualties, if those immediately controlling them have done their whole duty in reference to those who have sought to obtain the benefit of them. There was no attempt to show that the trustees had in any respect failed in the performance of their duty. If they had made suitable regulations, and had selected proper persons to fill the position of surgeons, then, whether those persons neglected to perform their duty, or whether another person, as the house pupil, not selected for the office of surgeon, assumed without authority to act as such, and injury has thus resulted, the plaintiff has no remedy against the corporation.”

Messrs. A. L. SOULE of Springfield, F. W. HURD of Boston, and C. W. CLIFFORD of New Bedford, have been appointed a commission to inquire into the expediency of revising the judicial system of the State, under the following resolve of the legislature, approved April 26, 1876:—

*“Resolved, That the Governor and Council be, and they are hereby, authorized to appoint a commission, consisting of three suitable persons learned in the law, to sit during the recess of the legislature, with authority to call witnesses to inquire into the expediency of revising the judicial system of the State, with a view to securing greater economy, efficiency, and promptness in the administration of justice, especially by justices of the peace, trial-justices, and police, district, and municipal courts. Said commission shall submit its report in writing, with bill or bills if practicable, to the Secretary of the Commonwealth, on or before the twentieth day of December next, on which day the commission shall expire. The Secretary of the Commonwealth shall cause the report to be printed as a document of the public series to be laid before the next General Court, and a sufficient number of copies to be printed to allow the secretary to transmit one to each member of the present legislature, in addition to the distribution of such documents now prescribed by law.”*

It is understood that the real matter for investigation is the anomalous condition of the courts of local jurisdiction. For the last few years the legislature has been making the experiment of establishing, from time to time, “district courts” in different parts of the State (a certain number of towns generally being a judicial district); courts intended within the reach of their jurisdiction to supersede the older machinery of justices’ and police courts. Some twenty-three district courts, in all, have thus far been erected. While it has been clear that improvements in this direction were needed, the efforts of the legislature have not pursued any well-arranged plan; and the result seems to be want of uniformity, some confusion, and altogether an anomalous condition of the inferior courts.

*In re SEARS’ WILL.*—In this case, which has attracted a good deal of attention on account of the enormous property involved, — supposed to amount to eight or nine millions of dollars, — a decision has just been rendered by the Supreme Court. The testator, Joshua Sears, died Feb. 7, 1857, leaving a will, containing among others the following provisions:—

“All the rest, residue, and remainder of my estate I give to said Alpheus Hardy, Horatio Harris, and Hugh Montgomery, their heirs and assigns, as joint-tenants in trust, to hold, invest, manage, and take care of the same, according to their best knowledge and discretion; and I wish them to invest one-half part of my estate in favorable purchases of real productive estate, stores to be preferred, looking well to the value and titles thereof; and I wish them to invest one-half part of said estate in bottom-mortgages on estates which shall be considered of twice the value of the money loaned thereon, the titles of such estates to be well examined. I give to my son, Joshua M. Sears, the sum of thirty thousand dollars, to be paid to him at the age of twenty-one years.

“All such parts of the income of my estate which may be necessary for the support and education of my son I direct to be used for that purpose; and, when he shall be twenty-one years old, I direct that four thousand dollars be paid to him

annually; when he shall be twenty-five years old, six thousand per year; and ten thousand dollars per year when he shall be thirty years.

"And in case of the death of my son before he arrives to the age of twenty-one years, then I direct that ten thousand dollars be paid to said town of Yarmouth for the purpose of a library, and six thousand dollars for free lectures in said town.

"And the residue and remainder of said estate I direct to be paid and divided, one-third thereof to my brother Charles, one-third to my brother Willard, and one-third to the children of my brother Thomas W. Sears."

The son named in the will, the only child of the testator, reached his majority the 25th December last, and at once claimed as sole heir all the property in the hands of the trustees, except so much as they needed to raise the annuities given in the will. The trustees filed their bill for instructions, making the brother of the testator, and the children of his deceased brothers, parties. The court has sent down the following rescript, ordering a decree in favor of the son:—

"1. The last clause of the will was intended to take effect only in case the son of the testator should die before he arrived at the age of twenty-one years. As this contingency has not happened, this clause is inoperative; and the town of Yarmouth and the testator's relatives named therein take nothing under it.

"2. The provision, that 'all such parts of the income of my estate which may be necessary for the support and education of my son I direct to be used for that purpose,' is applicable only during the minority of the son, and ceased when he became of age; and in the further provision in the same clause for the payment to the son of annuities of four thousand, six thousand, and ten thousand dollars, said annuities are not cumulative, but are substitutes of each other.

"3. It follows that the trustees hold the residue of the estate in their hands for the sole purpose of supporting a trust and paying an annuity which can never exceed ten thousand dollars.

"The intention of the testator requires that the trustees should retain in their hands so much of the estate as is needed to support this trust; but the surplus beyond this is property undisposed of by the will, and devolves to the son by way of resulting trust. As he alone is beneficially interested in such surplus, it should be transferred to him by the trustees."

MR. NICHOLAS ST. JOHN GREEN, Professor at the Boston Law School, and formerly lecturer at the Harvard Law School, died at Cambridge on the 8th of September last. Although his name was only beginning to be known to the public, his loss cannot be mentioned by those who knew him, and who have the improvement of the law at heart, without bitter regret. He was as important a figure in the field of jurisprudence as his equally lamented friend Chauncey Wright was in that of science and philosophy. In his early practice, he acquired a critical knowledge of the criminal law; and he undoubtedly started with a superstitious respect for the technical element which still prevails in that part of the law. In fact, it would seem evident, that, as a younger man, he must have held a good many of the prejudices, legal and political, which are natural to a strong nature unchastened by learning and reflection. But his reason was stronger even than his temperament; and as time went on, and he became a student of history, political economy, psychology, and logic, prejudice gave way to philosophy, and his convictions, without losing in



strength, were tempered by an appreciation of the other side which powerful men do not always acquire. He handled a question of law not only with the mastery of a logician who easily reduced a case under established principles, but also, and with equal power, in the light of the history which explains those principles, and the considerations of political science and human nature which justify them. The evidence of his ability was not confined to the lecture-room; for it is not too much to say, that no man at the Suffolk bar produced a greater effect upon the opinions of the Supreme Court, in the cases which he presented, than he. His arguments, in addition to the qualities of substance which we have mentioned, had a terseness and simple beauty of form which it is impossible to compare with any less-distinguished models than those of Judge Curtis. Mr. Green did not live long enough to construct a systematic work; but as, with him, theory was not an excuse for ignorance of details, but was based as much on exact and practical knowledge as it was on broad and careful study outside the law, those who knew him best hoped and expected, that, when he was satisfied with his patient preparation, he would produce results worthy of his talents. A few notes to his two volumes of criminal cases, and two or three articles in this *Review*, are all that the profession can judge him by; and they are, perhaps, enough. But those who have had the great benefit of his conversation and criticism know, that, although he had justified the opinion of his friends, the world has lost work which it could ill spare, and which it would certainly have known.

### MICHIGAN.

**USE OF HIGHWAY.** — An interesting point touching the use of highways arose in *Macomber v. Nichols*. The action was brought by Nichols to recover for an injury occasioned by his horse taking fright as he was driving on the highway. The fright was caused by an engine mounted on wheels, which the defendant was running along the road by means of the steam-power by which it was operated. The engine, which was used mainly for threshing, was moved from place to place for that purpose. Among other things, the jury were instructed, at the request of Nichols, that if they found that "the plaintiff was driving a well-broken and gentle horse in the public street, that the defendant, by running a steam-engine along said highway, caused plaintiff's horse to run away, and that plaintiff was thereby injured either in person or property, and that such steam-engine was well calculated to frighten horses of ordinary gentleness, then the plaintiff is entitled to recover;" that "a party placing upon the highway any vehicle unusual, and calculated from its appearance, and mode of locomotion, to frighten horses of ordinary gentleness, is liable for all damages resulting therefrom;" that "the defendant had no right to run his steam-engine on the public street or highway, if such engine was calculated to frighten horses of ordinary gentleness."

The Supreme Court held these rulings erroneous. COOLEY, J., says in the opinion, —

"The instruction, that any one placing upon the highway a vehicle unusual, and calculated from its appearance and mode of locomotion to frighten horses of

ordinary gentleness, is liable for all damages resulting therefrom, is not only erroneous, but it could not fail to mislead. It was an instruction, in substance, that the placing of such a vehicle in the highway is always, and under all circumstances, an illegal act; a wrong in itself, for which an action will lie on behalf of any one who may chance to be injured in consequence.

"Persons making use of horses as the means of travel or traffic by the highways have no rights therein superior to those who make use of the way in other modes. It is true that locomotion upon the public roads has hitherto been chiefly by means of horses and similar animals; but persons using them have no prescriptive rights, and are entitled only to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible, if any shall be discovered; and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods.

"When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods; and it cannot be assumed that these will be the same from age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience, or even to the injury, of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use, whenever it is found that the general benefit requires them; and, if the law should preclude the adaptation of the use to the new methods, it would defeat, in greater or less degree, the purpose for which highways are established. . . . Horses may be, and often are, frightened by locomotives in both town and country; but it would be as reasonable to treat the horse as a public nuisance, from his tendency to shy and be frightened by unaccustomed objects, as to regard the locomotive as a public nuisance, from its tendency to frighten the horse. The use of the one may impose upon the manager of the other the obligation of additional care and vigilance beyond what would otherwise be essential; but only the paramount authority of the legislature can give to either the owner of the horse or the owner of the locomotive exclusive privileges. If one, in making use of his own means of locomotion, is injured by the act or omission of the other, the question is not one of superior privilege, but it is a question whether, under all the circumstances, there is negligence imputable to some one, and, if so, who should be held accountable for it."

**DOG LAW.** — *Heisrodt v. Hackett.* — The "faithful dog" has before this "borne" his master "company" into court. He has, however, so far as we remember, thus far appeared only in the character of witness, — a part assigned him, we suppose, from some notion that the canine instinct is less liable to error, or at any rate to the disturbing influence of self-interest, than the memory of man. But in *Heisrodt v. Hackett*, lately decided in the Supreme Court of this State, he appears, or attempts to appear, — for the court discourages his effort, — in a new part. The facts are set out in the opinion delivered by MARSTON, J.: —

"The plaintiff in this case was engaged in the business of raising berries for market. His profits depended largely upon protecting the berries from naughty birds, who, having no moral or conscientious scruples or respect for plaintiff's interests, would sometimes descend, and, without leave or license, appropriate the berries to their own use. To prevent such high-handed dealings, the plaintiff became the owner and possessor of a small, amiable, and intelligent dog, with valuable hunting qualities. This dog, when the birds attempted to steal or take

the berries, would at once warn them of the danger they incurred; and they, upon seeing him approach, would immediately withdraw without waiting for the honor of a near acquaintance, so that not one of them would get a peck of the berries during the whole season. This dog had business everywhere around plaintiff's premises in watching and protecting them, — bolting in and out of all the rat-holes; catching and killing the occupants, if he could, but at the risk of soiling or losing his collar by the operation. There was a large, savage, and dangerous dog, a cross between a bull-dog and a mastiff, living near by plaintiff's residence. This was a dog without an owner. He was permitted to live, and was taken care of on defendant's premises. On Jan. 1, 1875, he went out making calls. The same day, plaintiff's little dog was out attending to his duties, — pursuing or chasing a flock of snow-birds from off plaintiff's fields and berries; and, while engaged in this laudable business, he followed the birds across the highway and into the field of a neighbor, where it does not appear there were any berries. While there, defendant's dog wilfully and maliciously attacked him, and with dangerous weapons — to wit, his teeth — so bit and injured the plaintiff's dog, that his bark was shattered. He went home in a languishing condition, and, languishing, on the same day did die. Plaintiff thereupon sued defendant to recover damages for the irreparable loss which he had sustained. The defendant justified his dog in what he had done, under the statute of 1873, requiring owners of dogs to procure a license therefor, and to cause the dog to wear a collar around his neck, and providing a penalty for keeping a dog contrary to its provisions. The sixth section of this act provides that any person may, and it shall be the duty of every police-officer and constable to kill, &c., any and all dogs going at large, and not licensed and collared, and should receive fifty cents from the township or city treasury for each dog so killed by them. Defendant claimed that his dog, in killing plaintiff's dog, acted under this section.

"Held, 1. That it does not appear from the record, and the court will not presume, that defendant's dog was either *de jure* or *de facto* a police-officer or constable; and that if he held neither of these positions at the time, then clearly it was not his duty to act in so summary and severe a manner.

"Held, 2. That it not appearing that defendant's dog ever applied to the township or city treasury, or received therefrom the compensation to which such officers are entitled in such cases, it cannot be said the proper public authorities ever, by paying him, ratified the act; that he does not come within the other clause, which permits 'any person' to kill such animals.

"Held, 3. That it does not satisfactorily appear that defendant's dog had sufficient intelligence or discretion to act in an official capacity in such cases; that as an officer, if he claimed to act in that capacity, he only had the right to kill plaintiff's dog in case he found him going at large not licensed and collared; and that whether defendant's dog had examined the records and ascertained thereby that plaintiff's dog was not licensed, or whether he stopped and deliberately examined plaintiff's dog to see if he had a collar on, does not appear; nor does it clearly appear that he killed him for the sole reason that he was not licensed and collared; and that, as he had no right to kill him for any other reason, the intention with which he committed the act becomes material; that even if the plaintiff's dog had no collar on, and the defendant's dog killed him, — not because in not wearing a collar he was violating the statute, but because of some spite or malice entertained towards him, — then it is clear he could not afterward come in and justify under this statute; but that, if for the sole reason that the plaintiff's dog was not licensed and collared, the defendant's dog, in the performance of his official duty, killed him, then, were it not for other considerations, his owner or possessor might be held not liable; that if, however,

there was not that coolness and deliberation which the law would require, but the act was prompted by or sprang from a wicked, depraved, or malignant disposition, then the act could not be justified

"Held, 4. That all such highly penal provisions of the law must be strictly construed; that, where a statute authorizes a particular officer to perform an act, another cannot do it and justify under the authority given (4 Bl. Com. 178); that where an officer or a person is, under certain circumstances, given authority to take life, a dog cannot 'of his own head' do the act, and afterward his owner say, 'Because an officer under the circumstances could have done the act, my dog had like authority.' See *Bishop v. Fahay*, 15 Gray, 61; *Kerr v. Seaver*, 11 Allen, 151.

"Held, 5. That, it not appearing that defendant's dog was licensed and had on a collar at the time he committed the act, he was apparently equally in the wrong and liable to be killed, and had no right to punish others no more guilty than he was himself.

"Held, 6. That the owner in any case would not be prevented from recovering if his dog was licensed and had kept a collar upon him, where perchance the collar without his knowledge in some way, either accidentally or otherwise, got off, until at least a reasonable time thereafter had elapsed to enable him to discover the fact and replace it; that the statute does not prescribe the kind of collar to be worn; and that, if plaintiff had put a paper collar upon his dog, experience teaches us that it would become soiled, and that frequent changes would become absolutely necessary; that if, under such circumstances, plaintiff had taken off the old in order to put on a clean collar, and, while in the act, defendant's dog, standing by and seeing the old collar taken off, would not be authorized at once, before plaintiff had time to replace it, to pounce upon and kill plaintiff's dog; and that if plaintiff's dog, in the pursuit of rats, had torn and destroyed his collar, the defendant's dog, watching for such opportunity, would have no right to take advantage of the circumstances and kill him before his owner had an opportunity to discover the fact and replace it; and that no such severe and deadly construction can be given to the statute.

"Judgment reversed, with costs, and new trial ordered."

Chief Justice COOLEY of the Supreme Court has been appointed lecturer on law in the new Johns Hopkins University at Baltimore.

## MISSOURI.

We have indicated above the state of mind of a certain portion of the inhabitants of Missouri, touching the propriety of paying their debts. We are sorry to learn from the *Central Law Journal*, that, in another important particular, matters are far from being in a satisfactory condition in that State. The *Law Journal*, speaking not more warmly perhaps than the subject deserves, says,—

"One of the worst features of our judicial system is, that succession to the judicial bench is made to depend upon the action of political caucuses. One of those caucuses in this State has put forth a platform ringing throughout with the cry of reform, and then has committed an act worthy of the worst days of machine politics by nominating for the office of judge of the Supreme Court a new and untried man in place of one of the ablest and best judges that has sat on that bench since its creation. We do not propose to enter into a political discussion; but we propose to speak our views plainly in regard to this matter: and we say, that men are judged by their

actions, and not by their words; and that when a political convention commits an act of this kind, and then cries 'Reform, reform!' its cry of reform is a false pretence. It is a shame that the election of a judge should be made a party question. It is a still greater shame that that miserable maxim of American politics, 'to the victors belong the spoils,' should ever have assailed the judicial bench, and threatened its independence. While a reform party is putting forward a purely party candidate for the supreme bench, the people, in some of their local conventions, are exhibiting a disrespect for that court worthy of French communists. A body of citizens in Morgan County the other day met and resolved to repudiate a certain portion of their funded county indebtedness, and, among other resolutions, adopted the following: '*Resolved*, That the decisions of our State Supreme Court on these bond questions are without precedent, and are unjust, partial to the bond-holder, and are utterly subversive of natural rights, and should not be respected by the people of Missouri in this behalf.' A stronger argument than this resolution could not be put forth, not only in favor of the independence of the judiciary from the influence of popular clamor, but also in favor of its independence of party politics. A political convention which met at Jefferson City on the 9th instant did itself honor in renominating Hon. David Wagner to the position he now holds. We sincerely hope that the voters of Missouri will see the propriety of viewing the claims of the two candidates solely with reference to their respective merits and services, and not from a party standpoint."

#### NEBRASKA.

IN *Thurston v. Union Pacific R.R. Co.* (U. S. District Court), as we learn from the *Legal Gazette*, a rule was laid down, which, it is to be hoped, the defendants will not be slow to avail themselves of. The plaintiff, a notorious gambler, having bought his ticket and taken his place in the train, was forcibly ejected therefrom on the ground that he was there for the purpose of gambling. In a suit for damages, DUDLEY, J., charged the jury, that though the company were bound to take every proper person who offered, upon his compliance with the rules of the company, still the person "must be upon lawful business;" that, as gambling was a crime against the State law, it was "not even necessary for the company to have a rule against it;" and that "whether the plaintiff was going upon the train for gambling-purposes, or whether from his previous course the defendant might reasonably infer that such was his purpose, is a question of fact for the jury. If they find such to have been the case, they cannot give judgment for any more than the actual damage sustained,"—the price of the ticket,—no offer having been made to return the money.

A rule involving the same principle was laid down in *Vinton v. Middlesex R.R. Co.*, 11 Allen (Mass.), 306, in which the court say the defendants had the right to "exclude or expel from their vehicles a passenger whose condition and conduct were such as to give a reasonable ground of belief that his continuance in the vehicle would create inconvenience and cause annoyance to other passengers," and that without waiting for any "overt act."

#### NEW HAMPSHIRE.

EVIDENCE. — OPINIONS OF NON-PROFESSIONAL WITNESSES. — The propriety of the rule which excludes the opinions of non-professional witnesses

on the question of sanity has been successfully challenged in *Hardy v. Merrill*. The matter was thoroughly re-examined; and in an elaborate opinion the court have reversed the rule, and our old friends, *Boardman v. Woodman*, 47 N. H. 120, *State v. Pike*, 49 N. H. 399, and *State v. Archer*, 54 N. H. 488, disappear as authorities on that point. This leaves the rule in force only, it is believed, in Massachusetts, Maine, and Texas. Even in these States, the increasing importance of the subject and the peremptory needs of justice have already introduced so many exceptions, that we may reasonably hope soon to see the rule itself give way. (See *Barker v. Comins*, 110 Mass. 477; and *Nash v. Hunt*, 116 Mass. 237.) Indeed, it may well be doubted whether the exceptions are given in any thing but name. Says FOSTER, C. J., in *Hardy v. Merrill*, —

“The Massachusetts rule is, that non-experts’ opinions shall be excluded: but the rule itself does not exclude them; it only excludes the use of certain words. It admits the opinions, and merely embarrasses the witness and confounds the jury by requiring the witness to express his opinion without using certain forbidden terms, and by using others that are understood by the jury and everybody else to be precisely synonymous. A non-expert, who has been watching by the bedside of a sick man, may say, ‘He was delirious all night.’ Anybody may say that a man was ‘crazy drunk;’ that a testator didn’t seem to understand any thing that was said to him, — seemed senseless, unnatural, not as usual; or that ‘no change was perceptible in his intelligence,’ ‘no incoherence of thought,’ nor any thing unusual or singular in respect to ‘his mental condition;’ was healthy or sickly in body. But, in giving his opinion of mental health or disease, the non-expert must not use the words ‘sane,’ ‘insane,’ ‘mentally disordered,’ or ‘deranged;’ but, so far as he can find synonyms for these words, he may express his opinion in them.”

It must be confessed that it is not easy to follow the reasoning of the court in *Barker v. Comins*. The questions asked of the witness were, “Did you notice any change in his intelligence or understanding?” and, “Did you notice any want of coherence in his remarks?” The court, on the point of the admissibility of these questions, say, “The questions did not call for the expression of an opinion upon the question, whether the testator was of sound or unsound mind, which the witnesses, not being either physicians or attesting witnesses, would not be competent to give. The question, whether there was an apparent change in a man’s intelligence or understanding, or a want of coherence in his remarks, is a matter, not of opinion, but of *fact*, as to which any witness may testify, in order to put before the court or jury the acts and conduct from which the degree of his mental capacity may be inferred.” There seems to be some confusion in the use of the word “fact.” Undoubtedly, in the ordinary meaning of the word, whether or not a man is insane is as much a fact as whether or not his conversation is coherent. But, if the court mean by fact that the matter in question is such that the witness can communicate it by merely giving what his senses have apprehended without the intervention of his reason, the position may well be denied. In the latter sense, the witness might testify that the testator spoke, or narrate what was said; but to say that what was said was coherent, implies, not only that the witness compares it with other conversations of the testator, but also that he has, by what of necessity must be a somewhat complicated mental pro-

ness, established for himself some kind of a standard of coherence, to the test of which he brings the words in question. Two witnesses who had heard a man speak could not truthfully disagree as to the fact of speaking; but they might, without the slightest question of their veracity, disagree widely as to whether what was said was coherent, or indicated a failure of understanding. In a word, the question of insanity is of precisely the same class as the questions in *Barker v. Comins*. Undoubtedly it is a more difficult one to answer; but that goes only to the value of the opinion given, and not to the right of the witness to give it.

Indeed, if the question should arise again before the Massachusetts courts, we do not see how they can escape the force of their own reasoning in the late case of *Commonwealth v. Sturtivant*, 117 Mass. 122. In that case, on the trial of the defendant for murder, a witness who had seen, while it was fresh, a certain blood-stain upon a coat, was allowed to state that the appearance of the stain indicated the direction from which the blood came, and to say that "it came from below upward." The court, in their opinion, say, —

"The exception to the general rule, that witnesses cannot give opinions, is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, and learning, but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances and facts, and a condition of things which cannot be reproduced and made palpable to a jury."

Not the least curious thing in *Hardy v. Merrill* was the fact brought to light in the examination of the court, that so far was the rule in question from being, as had always been supposed, in "accordance with the long-established and uniform usage" in the State, that quite the contrary was true: the fact being, that, during a great period of the judicial history of the State, the usage was the other way; and that the rule in question, laid down in 1866 and 1869, was a departure from the ancient ways. There would seem to be some reason, too, to believe that the rule in Massachusetts, though laid down very long before that in New Hampshire, was not in accordance with the still earlier decision of the court of that State.

## NEW YORK.

**STEWART'S WILL, *In re*.** — This was a petition of certain alleged relatives of the late A. T. Stewart to have the probate of his will vacated. The petition set forth that the petitioner and others named with him were heirs-at-law and next of kin of the testator; that the paper purporting to be the last will and codicils of said Stewart were, on the evening of April 13, 1870, presented to the surrogate for probate; and that, on the next day, letters testamentary were issued, and said will and codicils were recorded in the surrogate's office as duly proved; that the probate and record thereof were not made publicly at the surrogate's court-room or office, but privately, at the home of Mrs. Stewart, and in unusual haste, on the day of the funeral of said Stewart; and that no citation was issued and no notice directed to the petitioners. The petition also alleged that said will was obtained by the undue influence of Henry Hilton or some other person unknown to the petitioner. On the return

day, the counsel for the executors moved that the proceedings be dismissed so far as they sought to set aside the will as a will of personal estate. The petitioner's counsel assented, and the petition to that extent was dismissed. The widow and the executors filed answer, admitting the circumstances of the probate, but denying substantially the other allegations of the petition, and alleging that enormous sums had already been expended in prosecuting the plans of the testator, some of them of a charitable nature, and that large sums had been paid out as legacies. The surrogate held, against the executor's contention, that he had power to entertain the petition as a necessary incident to his jurisdiction, notwithstanding the probate of the will as a will of real estate is not conclusive either as to the validity or the due execution of will, but is *prima facie* evidence only; but that the petition "should be regarded as an appeal to the discretion of the court, and not as a matter of absolute right." On the question, whether a case had been made out which called for the exercise of that discretion, the opinion continues:—

"Under these statutes and authorities cited, there seems to be no doubt that at most the probate of the will in question is only *prima facie* evidence; and that, in any proceeding by the alleged heirs-at-law of the testator to enforce their alleged rights in respect of the real estate, the force of that probate may be attacked. It is entirely clear that this court has no power to grant to the petitioners any affirmative relief by which their rights to the real estate in question may be determined. If the probate should be opened, would the petitioner be in any better position to enforce his alleged claim to the real estate left by the testator than he would if the probate remained? He must take proceedings in another court by ejectment or partition, and must there show that he is an heir entitled; and, when he has shown that, the production of the probate would not be even *prima facie* evidence against his right, unless the party interposing the probate as an obstacle to the petitioner's claim could show affirmatively that the petitioner was duly cited on the probate; and, if he were so cited, under well-settled authorities in such cases he could attack the validity of the will as though it were never proved. . . . If I am right in my estimate of the effect upon the alleged rights of the petitioner, and those whom he assumes to represent, in the opening of the probate, it seems to me that it would be an unwise and unjust exercise of the judicial discretion of this court to open the probate where no practical and substantial benefit can inure to them, while it would be likely to throw discredit upon the tenure of the real estate devised to Mrs. Stewart, and paralyze the great enterprises now in progress.

"For the reasons above stated, the petition should be dismissed."

## OREGON.

**INVOLUNTARY BANKRUPTCY OF CORPORATIONS.**—*In re THE OREGON BULLETIN PRINTING AND PUBLISHING COMPANY.*—In this case the question arose, whether, to authorize an involuntary adjudication in bankruptcy against a corporation under the statute as amended in 1874, it was necessary that the petitioning creditors should constitute at least one-fourth thereof in number, the aggregate of whose debts provable under the act amount to at least one-third of the debts so provable; and DEADY, J., in an able opinion, held that it was not. (See 10 Am. Law Rev., p. 380.) This opinion has now been overruled by the Circuit Court, SAWYER, J. It will be remembered, that, by sect. 39 of the Bank-



ruptcy Act of 1867 (corresponding to sects. 5021-5023 of the Revised Statutes), any person resident in the United States, and owing provable debts exceeding \$300, might, if he committed certain specified acts, be adjudged bankrupt on the petition of one or more creditors whose debts amounted to \$250. By sect. 5122 of the Revised Statutes, it is provided that the provisions of the title ("Bankruptcy") shall apply to all "moneyed, business, or commercial corporations and joint-stock companies;" and that "upon the petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors." By act of 1874, the provisions of sect. 30 of the act of 1867 are amended so as to provide "that any person residing and owing debts as aforesaid," who shall commit certain acts, "shall be adjudged a bankrupt on a petition of one or more of his creditors who shall constitute one-fourth thereof at least in number, and the aggregate of whose debts, provable under this act, amounts to at least one-third of the debts so provable."

The line of reasoning of the lower court was, that sect. 5122, Revised Statutes, first applies the statute to corporations; that the language of the section, "any creditor," plainly implied that no reference need be had to the number of the creditors, or the aggregate of their debts; and that the act of 1874, containing only specific amendments, must be held in the case of sect. 39 to apply only to that section, and so to alter the petition only in the case of proceedings against a natural person. SAWYER, J., however, says, —

"The Revised Statutes, which embodied on a different arrangement the provisions of the Bankrupt Act of 1867, and repealed the latter as a separate and independent act, were actually passed on the same day with the act of June 22, 1874, purporting to amend and supplement the act of 1867 so repealed. Which of the two acts passed first in point of time on that day does not appear. It is necessary to a proper discussion of the question presented to ascertain and keep in view the relation of these two statutes to each other. Sect. 5595 provides that 'the foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature in force on the first day of December, one thousand eight hundred and seventy-three,' &c.; and the following sections repeal the previous acts. It is plain, that, whatever the result, the intent was, in this act, to express without change of sense, in a different form and arrangement, all the general statute law of the United States as it existed on Dec. 1, 1873; to substitute this arrangement and expression for prior acts as of that date; and to adopt that date as the dividing-line by which its relation to all other legislation subsequent to Dec. 1 should be determined. In accordance with this intention, sect. 5601 provides, 'The enactment of the said revision is not to affect or repeal any act of Congress passed since the first day of December, one thousand eight hundred and seventy-three; and all acts passed since that date are to have full effect as if passed after the enactment of this revision; and, so far as such acts vary from or conflict with any provision contained in said revision, they are to have effect as subsequent statutes, and as repealing any portion of the revision inconsistent therewith. . . . Under these provisions, the act of June 22, 1874, purporting to amend and supplement the Bankrupt Act of 1867, must be regarded as passed subsequent to the passage of the Revised Statutes, and, although referring in terms to the act of 1867, must be construed as referring to the provisions of that act as carried into and expressed in the corresponding sections of the Revised Statutes, and as amending and supplementing the provisions of the statutes relating

to bankruptcy as therein found expressed. . . . The decision of the question under consideration, then, must depend upon the construction put upon the Revised Statutes as thus amended. Sect. 5122 provides that 'the provisions of this title shall apply to all moneyed, business, or commercial corporations and joint-stock companies.' This provision is comprehensive, and embraces every provision of the title ('Bankruptcy'), except those which are inconsistent with some express or necessarily implied limitation, or which from the inherent character of corporations cannot in the nature of things be made applicable; as, for example, a corporation cannot in the nature of things be arrested or imprisoned. Sect. 5023 provides that 'an adjudication in bankruptcy may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least \$250.' This is one of the provisions of the title, is general and comprehensive, and is applicable to corporations, under the provision cited from sect. 5122, unless clearly repugnant to some other provision expressly relating to corporations; and there is no such provision, unless it be found in the clause, 'or upon the petition of any creditor of such corporation, or company,' in sect. 5122. Are these two provisions necessarily, or by any reasonable construction, upon a consideration of the whole title, and the general policy indicated in it, repugnant? In my apprehension, they are not. It must be borne in mind, that the principles upon which the act proceeds, and all the details and specific provisions relating to matters of bankruptcy, are prescribed in the other sections; and that the provisions of sect. 5122 relating to corporations are intentionally brief, general, and incomplete, providing merely for inherent differences between corporations and natural persons, and referring to the other provisions of the title for particulars unaffected by such inherent differences. Thus it was necessary to indicate in what way the corporate will should be manifested in a voluntary petition, as questions might arise upon this point; and it was accordingly provided that it should be by 'petition of any officer of such corporation, or company, duly authorized by a vote of the majority of the corporators at any legal meeting called for the purpose.' Having mentioned by whom the petition should be filed in a case of voluntary bankruptcy, it was natural and proper to indicate the party to file the petition in the correlative case of an involuntary bankruptcy; and it accordingly named as the party 'any creditor of such corporation or company.' In both cases it indicated the person to apply, without referring to the amount in which the corporation must be indebted to constitute an 'act of bankruptcy,' or the amount to which the party must be a creditor to entitle him to petition. These were specified in other provisions made applicable by the first clause of the section, and it was not necessary to repeat them here.

"Suppose sect. 5023 had read, 'An adjudication of bankruptcy, either against a natural person or corporation, may be made on the petition of one or more creditors, the aggregate of whose provable debts amounts to at least \$250,' sect. 5122 reading as it does now, 'upon the petition of any creditor of such corporation:' would these two clauses have been repugnant? Could they not have both stood together, one indicating only the relation of the party to the bankrupt necessary to give him the proper *status*, and the other the amount of the indebtedness which should be requisite to justify troubling the courts and the parties with the proceeding?"

The learned judge, after pointing out that sect. 5122 is silent as to the amount of indebtedness of a corporation necessary to justify the filing of a petition, and, further, that the section does not say what shall constitute an act of bankruptcy on the part of a corporation, proceeds:—

"In my judgment, after a careful consideration of the various provisions of the

act, the specific provisions of sect. 5122, so far as they go, are controlling in respect to corporations; but that all other provisions of the title of an additional character omitted to be mentioned in this section not repugnant to any of its express provisions, and not in the nature of things intrinsically inapplicable, are made applicable to corporations by the introductory clause of the section, 'the provisions of this title shall apply to all moneyed, business, or commercial corporations,' read in connection with the words of definition in other sections, and that the amount of indebtedness, exceeding \$300, necessary to constitute an act of bankruptcy, the amount (\$250) that must be due to a creditor in order to entitle him to file a petition, and the proviso as to the time when the petition must be filed in the case of natural persons, are all applicable to corporations; that these matters having been provided for by other provisions made applicable by the first clause in sect. 5122, and other provisions, there was no occasion to repeat them in that section; and they were accordingly omitted, with other omitted particulars. But, if one of these provisions is inapplicable to corporations, all must be; and one creditor, no matter to how small an amount, may control the matter, without regard to the interests of other creditors or stockholders, without any limitation as to time when the proceedings are to be instituted, and in a case where the aggregate indebtedness of the corporation is too insignificant to justify troubling the parties or the courts with the litigation.

"Upon the construction adopted, the provisions of the Bankrupt Act operate uniformly, and are harmonious in all particulars where there are no inherent characteristic differences between corporations and natural persons, and different provisions are made only to meet such difference. This is what we should expect to find in a statute.

"If I am right in the construction given to the revised statute, unaffected by the amendment of 1874, there can be no further difficulty in the case; for the amendment is clearly as broad and comprehensive as the unamended statute. If wrong, the amendment contains inherent evidence, either that Congress supposed my construction to be the correct one, and acted upon that view, or else that it intended the amendment to be broader in its scope, and to include corporations in all its provisions not in the nature of things inapplicable.

"That the amendment was intended to apply to corporations, whatever the proper construction of the former act, to my mind seems clear.

"Sect. 5013 of the Revised Statutes, like sect. 48 in the act of 1867, provides that 'in this title the word "creditor" shall include the plural also; . . . the word "person" shall also include "corporation."' The statute has itself defined the word 'person,' for the purposes of the act, not for some sections only, but wherever it occurs; and that definition includes 'corporation;' 'creditor,' in sect. 5122, means also creditors; and 'person,' in 5021, 'corporation.' Under this definition we are authorized and required to read the words 'any person,' in the amendments of 1874, 'any person or corporation.' . . .

"If I am right in my view of the amendment of 1874, it must prevail, whatever the construction put upon the provision of previous acts, since it is the last expression of the legislative will; and it repeals all inconsistent provisions wherever found, as well those of sect. 5122, if those are inconsistent, as of 5021, 5022, and 5023.

"In the very able opinion of the district judge, it is said that the definition of the word 'person,' in sect. 5013 of the Revised Statutes, is limited to the word 'person,' as used 'in this title;' that the amendment of 1874 is an independent act, which is no part of 'this title,' and therefore that it does not embrace the word 'person,' as used in the Revised Statutes. The title is 'Bankruptcy,' and, in contemplation of the Revised Statutes at the time of their supposed passage, embraced all the statute laws upon the subject of bankruptcy. In the beginning of this opinion, it is held that the

amendatory provisions of the act of 1874, for reasons stated, although referring by name and section to the repealed act of 1867, must be construed as amending the corresponding sections of the Revised Statutes. Upon this view, the amendatory provisions fall into the place of the sections of the Revised Statutes amended, as amendments, and thus become a part of the title of the Revised Statutes amended, and are brought within the operation of the defining sect. 5018. Sect. 12 of the act of 1874 revises and embodies the entire subject-matter of sects. 5021-5028 of the Revised Statutes, and, upon well-settled principles of construction, takes the place of, and repeals, all those sections. Besides, sect. 21 expressly repeals all acts, and parts of acts, inconsistent with the provisions of the act of 1874."

This opinion is undoubtedly the sounder one; and it is, moreover, in accord with that pronounced by Judge DILLON in *re Leavenworth Savings Bank*. It is true that it seems likely to operate as a practical suspension of the Bankrupt Act, so far as large corporations are concerned; and that it adds another to the many difficulties we have before pointed out as attending the working of that act. On the other hand, it should be remembered that the very cause of the difficulty — the number of the creditors of a large corporation, namely — shows the danger of giving one creditor too much power through the machinery of the Bankrupt Law over the bankrupt's affairs. In the case of such corporations, the question is by no means necessarily, nor perhaps is it usually, between the interest of any one creditor and the interest of the bankrupt, but between the interest of the one creditor and the interest of his fellow-creditors.

**LIABILITY OF ATTORNEYS.** — An opinion of interest to the profession, at least to that portion of them engaged in searching titles, has recently been given by Judge DEADY, in *Page v. Trutch*. The defendant had loaned money on a mortgage of real estate, relying on a certificate of the plaintiff, who had examined the title for him, to the effect that the proposed mortgagor, a guardian, was duly authorized to make the loan, and execute the mortgage as security therefor. Afterwards, the plaintiff, being employed by the defendant to foreclose the mortgage, the interest being in arrear, brought suit in the Circuit Court. His action was dismissed, on the ground that the guardian had no authority to mortgage; but, on appeal to the Supreme Court, that court entered a decree foreclosing the mortgage, and ordering a sale of the property. The present action was brought to recover for plaintiff's services in the foreclosure suit. The plaintiff claimed a larger compensation than usual, on the ground of the character of the litigation, and the time and labor spent about it; to which the defendant answered, that, as the loan was made on the strength of the plaintiff's certificate, if any serious question had arisen, it in so far impugned the correctness of that certificate; and that, therefore, any extra time and labor spent by the plaintiff was, in fact, for himself. The court adopted the defendant's view, saying, —

"The certificate is not to be considered a warranty against every frivolous and speculative question which the dishonesty of the debtor or the ingenuity of counsel may interpose against the enforcement of the security; but I think it ought to be held as a warranty or representation, not only that the mortgage would be found or held to be valid at the end of a protracted and expensive litigation, but that there was no palpable, grave doubt or serious question concerning its validity.

"Ordinarily, when a party loans money upon the certificate of an attorney that the title to the proposed security is good, he does not expect, that, in the enforcement of such security, he may encounter a question which gives the debtor or other persons interested in the property a reasonable ground to contest his claim, and put him to the risk and expense of a contested litigation. Upon this branch of the case my conclusion is, that, the defendant having taken the security in question upon the opinion of the plaintiff that it was valid, whatever extra labor or risk the latter incurred in enforcing it on account of its alleged invalidity was incurred in contemplation of law and good morals for himself, and not the defendant, and therefore he is only entitled to compensation as for an uncontested suit to foreclose."

It may be a work of some nicety to draw with exactness the line between the questions which may and those which may not be asked at the expense of the attorney who has examined the title, touching the validity of any given mortgage.

#### PENNSYLVANIA.

In *Hartell v. Viney* (United States Circuit Court for Eastern District of Pennsylvania) it has just been held that the word "centennial" is general property, and cannot be used for a trade-mark. 2 Weekly Notes of Cases, 602.

#### ENGLAND.

**CARRIER BY WATER. — ACT OF GOD. —** A point of great interest regarding the exemption of common carriers by the "act of God" arose in *Nugent v. Smith*, 34 L. T. N. S. 827. The plaintiff shipped two horses on board the defendant's steamship, which plied between London and Aberdeen. The plaintiff took no bill of lading. On the voyage, during rough weather, one of the animals, a mare, partly from the rolling of the ship and partly from her own struggles caused by fright, was injured so that she died. At the trial, certain questions were left to the jury; among them these: (1.) "Was the injury caused by negligence of the defendant's servants, either in preparing for bad weather, or in attempting to save the mare from the consequences of bad weather? *Ans. No.*" (4.) "Was the injury caused partly by more than ordinary bad weather, and partly by the conduct of the mare herself, by reason of fright and consequent struggling, without any negligence of defendant's servants? *Ans. Yes.*" (5.) "Were there any known means, though not ordinarily used in the carriage of horses by people of ordinary care and skill, by which the defendant could have prevented the injury to the mare?" The jury were unable to agree upon an answer to the last question. In the opinion of the court below, giving judgment for the plaintiff, BRETT, J., after defining "act of God," that "it must be such a direct and violent and sudden and irresistible act of nature as could not, by any amount of ability, have been foreseen, or, if foreseen, could not, by any amount of human care and skill, have been resisted," proceeds: "We cannot say, notwithstanding the inability of the jury to agree to an answer to the fifth question left to them, that the defendant has in this case satisfied the burden of proof cast upon him so as to bring himself clearly within the definition. It seems to me impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened

by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred."

On appeal, the defendant admitted that he was liable as a common carrier, but contended that he was excused by the act of God from responsibility. The judgment was reversed, and judgment given for the defendant. Regarding the degree of care required of the defendant, COCKBURN, C. J., says,—

"It is somewhat remarkable, that, previously to the present case, no judicial exposition has occurred of the meaning of the term 'act of God,' as regards the degree of care to be applied by the carrier in order to entitle himself to the benefit of its protection. We must endeavor to lay down an intelligible rule. That a storm at sea is included in the term 'act of God' can admit of no doubt whatever. Storm and tempest have always been mentioned in dealing with this subject as among the instances of *vis major* coming under the denomination of 'act of God.' But it is equally true that it is not under all circumstances that inevitable accident arising from the so-called 'act of God' will, any more than inevitable accident in general by the Roman and Continental law, afford immunity to the carrier. This must depend on his ability to avert the effects of the *vis major*, and the degree of diligence which he is bound to apply to that end. It is at once obvious, as was pointed out by Lord Mansfield in *Forward v. Pittard* (1 T. R. 27), that all causes of inevitable accident, *casus fortuitus*, may be divided into two classes,—those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term 'act of God' to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term 'act of God' is properly applicable. On the other hand, it must be admitted that it is not because an accident is occasioned by the agency of nature, and therefore by what may be termed the 'act of God,' that it necessarily follows that the carrier is entitled to immunity. The rain which fertilizes the earth, and the wind which enables the ship to navigate the ocean, are as much within the term 'act of God' as the rainfall which causes a river to burst its banks and carry destruction over a whole district, or the cyclone that drives a ship against a rock or sends it to the bottom. Yet the carrier, who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in the former. For here another principle comes into play. The carrier is bound to do his utmost to protect the goods committed to his charge from loss or damage, and, if he fails herein, becomes liable from the nature of his contract. In the one case he can protect the goods by proper care: in the other it is beyond his power to do so. If, by his default in omitting to take the necessary care, loss or damage occurs, he remains responsible, though the so-called 'act of God' may have been the immediate cause of the mischief. If the ship is unseaworthy, and hence perishes from the storm which it otherwise would have weathered; if the carrier, by undue deviation or delay, exposes himself to the danger which he otherwise would have avoided, or if, by his rashness, he unnecessarily encounters it by putting to sea in a raging storm,—the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of it. This being granted, the question arises as to the degree of care which is to be required of him to protect him from liability in respect of loss arising from the act of God. Not only, as has been observed, has there been no judicial exposition of the meaning of the term 'act of God,' as regards the degree of care to be applied by the carrier in order to entitle himself to its protection, but the text-writers, both

English and American, are for the most part silent on the subject, and afford little or no assistance."

After some reference to the civil law regarding "inevitable accident," the opinion proceeds:—

"In our own law on this subject, judicial authority, as has been stated, is wanting; and the text-writers, English and American, with one exception, afford little or no assistance. Story, however, in speaking of the perils of the sea, in which storm and tempest are, of course, included, and consequently, to a great extent, the instances of inevitable accident at sea which come under the term 'act of God,' uses the following language: 'The phrase, "perils of the sea," whether understood in its most limited sense as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents occurring upon that element, must still in either case be understood to include such losses only to the goods on board as are of an extraordinary nature, or arise from some irresistible force, or from inevitable accident, or from some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence. Hence it is, that, if the loss occurs by a peril of the sea which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party.' Story, it will be observed, here speaks only of 'ordinary exertion of human skill and prudence, and the exercise of reasonable skill and diligence.' I am of opinion that this is the true view of the matter, and that what Story here says of perils of the sea applies equally to the perils of the sea coming within the designation of 'acts of God.' In other words, that all that can be required of the carrier is, that he shall do all that is reasonably and practically possible to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major* as the act of God. I do not think that because some one may have discovered some more efficient method of securing the goods which has not become generally known, or because it cannot be proved, that, if the skill and ingenuity of engineers or others were directed to the subject, something more efficient might not be produced, that the carrier can be made liable. I find no authority for saying that the *vis major* must be such as 'no amount of human care or skill could have resisted,' or the injury such as 'no human ability could have prevented;' and I think this construction of the rule erroneous. That the defendants here took all the care that could reasonably be required of them to insure the safety of the mare, is, I think, involved in the finding of the jury directly negating negligence; and I think it was not incumbent on the defendants to establish more than is implied by that finding. The matter becomes, however, somewhat complicated from the fact that the jury have found that the death of the mare is to be ascribed to injuries caused partly by the rolling of the vessel, partly by struggles of the animal occasioned by fright; leaving it doubtful whether the fright was the natural effect of the storm, or whether it arose from an unusual degree of timidity peculiar to the animal, and in excess of what would generally be displayed by horses. But the plaintiff is in this dilemma: if the fright which led to the struggling of the mare was in excess of what is usual in horses on ship-board in a storm, then the rule applies that the carrier is not liable where the thing carried perishes or sustains damage by reason of some quality inherent

in its nature, without any fault of his, and which it was not possible for him to guard against. If, on the other hand, the fright was the natural effect of the storm and of the agitation of the ship, then it was the immediate consequence of the storm, and the injuries occasioned by the fright are sufficiently closely connected with the storm, in other words, with the act of God, to afford protection to the carrier."

EXTRADITION. — Now that Winslow has been released, and the matter of a new treaty of extradition has come up, the discussion seems to have left the narrower ground of what the treaty of 1842 did or did not contain, and to have entered upon the broader and more satisfactory field of what such a treaty should contain. We give, from the *Pall Mall Budget*, a summary of two or three interesting debates on the matter in the House of Lords. It will be seen that the so-called "American view" finds warm supporters. The *Pall Mall* says, —

"The debate is to be welcomed as showing signs of a disposition in some quarters to revert to a more reasonable theory of international rights and duties in respect to the surrender of refugee criminals than has hitherto prevailed in England.

"Lord Derby stated the two opposing theories which may be maintained on the question with so much precision, that we cannot do better than quote his actual words. 'The American contention is,' he said, 'that when the forms prescribed by treaty have been gone through, and when extradition has once been effected, the person extradited is for all purposes in the hands of the government which has received him, although he may have been acquitted of the charge on which the extradition was granted; although in the original demand for his surrender no mention was made of any other imputed offence, and even although the offence for which he is put on his trial a second time may be one not included in the list of extradition crimes. They argue, in short, that once in their hands, and having been tried for the extradition offence, he remains in their hands for all purposes. We, on the other side, contend that a person who has taken refuge in England, and has been surrendered, after certain legal proceedings, for the purpose of being tried on a specific charge, is only lent, so to speak, to the government which claims him for the purpose of that trial; and if upon the charge brought he is not found guilty, then we say he is entitled to his freedom, and cannot be claimed again except after a repetition of the preliminary inquiry which is necessary before extradition; which, of course, implies that he must have an opportunity of returning to England.' We should have supposed, that, to any one who approaches this question with a judgment unbiassed by preconception, doubt as to which of these two theories is the more rational would hardly be possible. Two simple principles of universal acceptance — the one that civilized nations have a common interest in the repression of crime, and the other that men are rightly amenable to the laws, and justiciable according to the procedure of the country of their allegiance, and of no other — would seem to supply ample materials for a decision in favor of the American view. The rival theory appears to us utterly untenable, except upon an assumption which has itself, as we pointed out last week, no natural foundation in justice or international duty, but is simply the elevation of what is partly the safeguard of a principle of purely domestic policy, partly a mere rule of judicial convenience, to the dignity of a 'first principle' of justice," — the assumption, namely, that, because a criminal whose extradition is demanded must be *prima facie* proved to have committed acts amounting to a crime according to the law of the country which surrenders him, he thereby acquires "a sort of vested right to be tried according to British law, — a right indefeasible even by his removal to the country of his allegiance."



"We noticed on the last occasion the extent to which Lord Derby is evidently possessed by this theory, and criticised the example in which he applied it. In the debate of the other night, he supposed another case to much the same effect, — the case, namely, of a man who should have been extradited by this country to the United States on a charge of forgery, and who, having been tried and acquitted on that charge, should be thereupon tried for another offence. What right, Lord Derby asks, 'has the State, which has only got hold of him on presumably the former offence, to deal with him on another charge in a way that they could not have done if he had not been in the first instance unjustly accused? They are, in such a case as I have supposed, — I use the phrase in a legal and not in a moral sense, — taking advantage of their own wrong.' The argument is here put in a somewhat more specious form than it is in Lord Derby's last despatch to Colonel Hoffmann; but it will be found, on a little closer examination, to involve the very theory against which we protested last week, — the theory that a refugee acquires certain new rights as against the courts of his own country by the mere fact of having made his escape to a foreign land. That this is really the assumption may readily be shown. For let us suppose a man to have been arrested in his own country and tried upon an unfounded charge, and after his acquittal to have been put a second time upon his trial for a crime which was only traced to him by the police subsequently to his arrest on the former charge. Here the government which proceeded against him would undoubtedly have derived an advantage from having arrested him on an unfounded charge, — the advantage, namely, of having him in custody, and ready to be tried for the offence which he has really committed. But surely we should provoke a smile by saying in such a case that the government had 'profited by its own wrong.' Yet wherein is the difference between the two cases? It resides simply and solely in the fact that in the former instance the prisoner has made his escape to another country, while in the latter he has not. And that Lord Derby can use language in one case which he would see to be inappropriate in the other admits of but one explanation. He must be of opinion that some sort of right or equity is offended against in the person of the extradited prisoner who is tried on the second charge, which right or equity does not exist to be offended against in the other case. This is, in fact, the right to get, in respect of *all* crimes committed by him before his flight, the benefit of the superior leniency of the law of the country in which he has temporarily taken refuge. The prisoner, as Lord Derby puts it in his comments upon his hypothetical case, is injured by being tried for some crime 'for which, if he had remained in England, it is quite possible that extradition would never have been granted.' We altogether deny the reality of the supposed injury, and dispute any claim on behalf of the prisoner to an immunity which he might have enjoyed under the law of a country, where, from the moment a *prima facie* charge of criminality, whether ultimately sustainable or not, was established against him, he ceased to have any right of sojourn at all.

"The same inversion of the true sequence of considerations runs through Lord Derby's argument that the American contention is illogical. Either have no preliminary inquiry at all, he argues, or have it consistently as regards *all* offences. It is inconsistent to say, 'We will give the accused the security of a previous inquiry in regard to the first offence for which he is tried; but we will not give it him in regard to any other charge subsequently brought against him.' This argument would be cogent enough if the essential object of the inquiry were properly considered, — the security of the accused. But we contend that its essential object is, or, at any rate, ought to be, the satisfaction of the government of the country of asylum; and the preliminary inquiry should only operate for the 'security of the accused,' inasmuch as that government is willing to secure him against purely arbitrary arrest. From

this point of view, there is nothing inconsistent in a country requiring *prima facie* evidence that the arrest of the refugee is not purely arbitrary, and then declining to trouble itself any further about him."

Regarding a later discussion in the Lords on the question, whether the maxim *Expressio unius est exclusio alterius*, the *Pall Mall* continues:—

"We will not undertake to dispute Lord Selborne's proposition, that there is no downright 'international obligation' of extradition arising out of the comity of nations, and independent of treaty: but, without disputing this, there is room for abundant difference of view as to the proper attitude of a nation anterior to treaty towards refugee criminals within its territories; and, according as these views differ, views will differ also as to the interpretation to be placed upon treaties subsequently passed. A State may not be internationally bound to surrender refugee criminals to another State on demand; but it can hardly be denied that it has the right to do so if it pleases; and, according to the opinion which any man holds as to the general expediency of a very free exercise of that right, will he be disposed to put a liberal or a narrow construction on the terms of an extradition treaty. Those, for instance, who look upon such a treaty as merely declaratory, and regulative of the antecedent right and policy of a State to surrender refugee criminals to other States,—of a power, that is to say, exercisable in virtue of national sovereignty, and to be freely exercised, in fact, in virtue of international expediency,—such persons, we say, will be apt to read the schedule of crimes enumerated in such a convention very differently from those who regard the right to surrender accused fugitives as the sole creation of the treaty. To the former there will appear nothing unreasonable in the contention, that, though the treaty only enumerates certain crimes as the subjects of extradition, it did not mean to limit the right of the demandant nation to try the extradited criminal for other offences against its law: to the latter, such an argument will appear almost like the illicit extension of the terms of a penal provision of municipal law to cases not properly within its scope. In other words, *expressio unius* is in the one case, and is not in the other, taken to be *exclusio alterius*. And this difference of construction, arising, as we have seen, from a difference of view as to matters anterior to the treaty, is obviously irreconcilable by any appeal to the terms of the instrument itself, still less by any arguments founded, like that of Lord Cairns, on the interpretation of analogous expressions in other legal instruments.

"It is a difference of this kind which is really at the bottom of the late dispute between our government and that of the United States. Mr. Fish held the broader, and, as we think, the more reasonable view of the international question to which the treaty applies. Lord Derby, as, indeed, appears abundantly from the arguments in his despatches, upon which we have on former occasions commented, took the narrower view. The former approached the question from the point of view of the States interested: the latter approached it, as it has been far too much the custom of his country to do, from the point of view of the criminal. As far as past controversy is concerned, this distinction has, of course, only a speculative interest; but it has a highly practical bearing on future negotiations. The question now at issue between Lord Derby and Mr. Fish, with reference to the terms in which the new treaty is to be framed, has its origin, as the despatches which have passed between the two show clearly, in the respective divergence of their views as to the 'rights of the refugee;' and it is, in our opinion, much to be desired, that, subject to the necessity of safeguarding political asylum, the American view, as the more reasonable, may prevail. Lord Selborne, we are glad to see, has lent the weight of his authority to this side of the dispute, and expressed, in even more

precise terms than Lord Kimberley, what we hold to be the true theory on the subject. 'The sole purpose,' he said, 'of applying the test of British law in this country is, that, before we give up the refugee, we should have *prima facie* evidence that he is guilty of one of the crimes specified in the treaty of extradition. We give him up then because we have confidence in' (we should go so far as to say, 'because it is no business of ours to question') 'the justice of the country which claims him; and, if the conditions on which we give him up are fulfilled, I am utterly at a loss to understand why he should not afterwards be tried for any offence whatever, other than political, for which American law can try him.'

JUDICATURE ACT. — Now that the long vacation has come, those interested in reform in legal procedure have begun to reckon up the gains and losses shown in the first year's working of the new act. After making all allowance for the extent of the experiment, and the shortness of time in which it has been tried, the general tone seems to be one of disappointment and complaint. The judges, even, are charged with being "obstructive, and preventing the proper working of the act," — a charge, by the way, that Lord Coleridge has somewhat warmly denied the truth of in the House of Lords. It seems to us, however, that the charge is not altogether groundless.

In commenting on the result of the year's trial, the *Solicitors' Journal* says, —

"As regards the new judicial machinery, there are several failures to record. We need not refer at any length to the most melancholy of these, — the official referees, — for the shyness which suitors have displayed in availing themselves of the services of these gentlemen may perhaps be ascribed to the discussions which occurred with reference to one of the appointments, and also to the singular scale of fees for services, locomotion, and subsistence which was promulgated, by which, as we pointed out at the time, the fees were made about double those of the common-law masters, and under which a two-days' reference at Leeds would probably cost in fees to the referee and his clerk alone over £80. But the whole system of references provided by the acts has, for some reason or other, failed to supersede the old system; and we have now side by side two different modes of conducting arbitrations. We think it cannot be said that the public have shown any decided preference for the new regulations as to special referees.

"The provisions as to calling in the aid of specially qualified assessors have, we believe, with very slight exceptions, been a dead letter. The Court of Appeal has once or twice been privately enlightened upon the mysteries of port and starboard by two very well-behaved and particularly silent naval gentlemen; but we do not recall at this moment any instance in which the High Court has availed itself of the help of specially qualified assessors. Nor can it be said that the acts have as yet produced any material change in the mode of trying actions. Trial before a judge alone has not taken root in the common-law divisions any more than trial by jury has in the Chancery Division; and the provisions of the rules as to evidence being taken *viva voce*, in the absence of agreement, have only to a limited extent changed the practice formerly prevailing in the Court of Chancery. Some of the learned judges of the Chancery Division have placed strong pressure upon parties to induce them to adopt the old method of taking the evidence. In *Patterson v. Wooler* (24 W. R. 455), the costs of a motion to take evidence by affidavit were inflicted on trustees who had opposed it; and in granting an application to take evidence by affidavit, made in February last, Vice-Chancellor Hall took occasion to express his opinion that the interests of suitors would be best promoted by the evidence in all actions being taken as much as possible by affidavit."

On the subject of pleading in equity, as affected by the act, the *Journal* continues:—

"When the Judicature Act of 1878 was passing through Parliament, one of the most distinguished of the judges remarked that it was 'a special excellence' of the bill that it 'seemed to do so much, and did so little.' About the same time, another of the judges, himself a leading member of the commission upon whose report the bill was founded, remarked in court, when dealing with a very oppressive set of interrogatories, 'When the act comes into operation, we will get rid of all this.' In these two sentences are comprised, with slight exceptions,—at least, so far as the Chancery Division is concerned,—the practical operation of the act upon questions of pleading. It is true that a very astute judge like the Master of the Rolls, when he determines now and then to waste a few moments in 'most excellent fooling,' can satisfy, or appear to satisfy, *himself*, that from two-thirds to three-fourths of the pleading before him—whatever it may be—might have been safely omitted, and can, when minded to get back to business, wind up his remarks with 'But it is a very good bill all the same, though not a statement of claim at all,' or something of that sort; and it is true, that, at the moment, his criticisms may have been unanswerable. But the practical fact remains: slightly shortened at the head, a little altered (not shortened) at the tail, the body of every well-drawn 'statement of claim' is 'a very good bill;' and every attempt at any serious departure from this type has, so far, 'come to grief.' We believe that we are not exaggerating when we say that there have been more cases in which either demurrers have been allowed 'with liberty to amend,' or amendments in point of pleading have been ordered by the judge since the commencement of the act last November, than in any three years since the introduction of the previous system in 1852, and that at least nine-tenths of the amendments have consisted simply in the insertion of some statement or the addition of some party which or who would have been introduced or added as of course before the act; the omission having been made with an idea of conciseness, and accordingly judicially denounced as 'an experiment.'"

The point of chief interest, however, in the act, was the attempted fusion of law and equity; and it is on this point that something very like a quarrel has broken out between the judges of the common-law divisions of the High Court and the judges of the Chancery Division, owing to the construction put by the latter on the rule which allows the transfer of causes from one division of the court to another. The Master of the Rolls had ordered that the issues of fact in a case set down before him, *Cave v. Mackenzie*, should be tried before a jury at the assizes at Chelmsford. On the case coming on for trial, Baron HUDDLESTON, after conference with the Lord Chief Justice, refused to try the case, and ordered it back to the Chancery Division. The Master of the Rolls refused, however, to have any thing to do with it, except to advise the plaintiff to appeal from the judge's order. On appeal, the Appeal Court said that they "thought Baron HUDDLESTON's order was not one which could be appealed from, and that they did not see how they could interfere." They gave the plaintiff, however, the valuable suggestion, that "perhaps he might have a right to petition Parliament, or to make some application to the Lord Chancellor or the Attorney-General." The Lord Chief Justice, says the *Pall Mall Gazette*, took occasion, at a later day, to refer to the difficulty in terms which showed that the trouble has been preparing some time. "To make a distinction," he said, "between the different divisions of the High Court, as

to the trial of issues of fact as distinguished from questions of equity, is directly contrary to the spirit of the recent legislation, which aims at the fusion of law and equity, and must tend to frustrate the wise design that we should all constitute one great court administering justice, though sitting in different divisions and in all its forms." But "it was a matter of notoriety that the equity judges have come to a resolution that they will not try causes by jury, although recent legislation had given them full powers and facilities for doing so. They have made up their mind, that, when questions of fact are to be tried, those questions shall be sent to us. They have even got rid of the structural arrangements in the form of jury and witness boxes in their courts."

"The difficulty," continues the *Pall Mall*, "is of peculiar interest, as being the first public manifestation of those results which were predicted for the Judicature Act by its adverse critics. It was said that the fusion of law and equity was not to be accomplished by merely enacting that each division of the High Court should exercise complete legal and equitable jurisdiction, and that, unless both the common-law and equity courts showed a not-to-be-expected readiness to exercise the new powers conferred upon them respectively by the act, matters would go on much as before. The incident which has just occurred is the first public confirmation which these unfriendly prophecies have received; and it comes from that side of the High Court, whence, perhaps, such confirmation was less to be expected than from the other. The first serious hitch in the working of the Judicature Act has originated, not in the unwillingness of the common-law divisions to administer equitable jurisprudence, but in the unwillingness of the chancery divisions to adopt the common-law procedure; and turning as this does upon a question of mere procedure, and not of jurisprudence, the failure to carry out the intentions of the Judicature Act is, it seems to us, less excusable than if the case had been reversed."

The matter has already been the subject of comment in both Houses of Parliament.

**ECCLESIASTICAL COURTS.**—In *Phillimore v. Machon*, the vicar-general of the Bishop of Lincoln, dissatisfied, perhaps, with the working of the new law machinery, attempted to set in motion the rusty machinery of the ecclesiastical courts for the punishment of the laity "for the good of their souls." He took, as a beginning, the case of a false oath made in obtaining a marriage license, relying on "extracts from the records of the Consistory Court of London between 1475 and 1640, published by Archdeacon Hale." Lord PENZANCE, however, promptly refused to take jurisdiction of a matter so little "in harmony with modern ideas;" pointing out, that, if a second attempt were made to punish a man for the same offence, it was a maxim of law as well as of common sense that he should be allowed to plead his former conviction or acquittal, as the case might be, but that, if indicted in the temporal court for the matter of this application, as he might be, he could not support his plea by proof of the decree in the ecclesiastical court.

The *Solicitors' Journal*, in commenting on the above facts, adds, "If the vicar-general is still unsatisfied, and desires to find fresh fields for the exercise of ecclesiastical authority, we may be permitted to draw his attention to

another branch of the ancient jurisdiction of the Consistory Court. There is clear precedent to be found in the cases in Archdeacon Hale's book for the licensing of midwives by this court; and it seems to us that the vicar-general might do public service by turning his attention to the revival of this jurisdiction. Further research might, perhaps, lead to the welcome discovery, that monthly nurses are amenable to the spiritual courts."

THE APPELLATE JURISDICTION BILL received the royal assent the 11th of August. It excited considerable discussion, and was somewhat amended during its passage. Owing to the tardiness, however, of our exchanges in reaching us, we are compelled to defer a more extended notice of it to our next number.

SIR THOMAS HENRY, chief magistrate at the Bow-street Police Court, died June 16, at the age of sixty-nine. Born in Dublin in 1807, he graduated at Trinity College, Dublin, and was called to the bar at the Middle Temple in Hilary Term, 1829. In 1840 he was appointed a magistrate at Lambeth Police Court, and in 1846 was transferred to Bow Street. "As senior magistrate," says the *Solicitors' Journal*, "he was called upon to pass upon many important points in questions of extradition, charges of treason, &c.," and was, it is said, consulted by the government in the framing of several extradition treaties. The *Law Times* says of him, —

"The death of Sir THOMAS HENRY is an event the consequences of which are not easily apprehended. An efficient chief of the metropolitan magistrates is perhaps the rule, and not the exception; but a chief who to his efficiency as a magistrate adds the accomplishments of a jurist and the wisdom of a statesman is rarely found. Such a chief was Sir THOMAS HENRY. The government of the day and the public thoroughly believed in him; the profession revered him; and his colleagues on the bench recognized him as being indisputably first among them, not only by reason of his position, but also on the score of intellectual capacity. His loss must be severely felt: to replace him satisfactorily must be a matter of difficulty."

## EGYPT.

A SERIOUS difficulty has arisen in the working of the new courts in Egypt, of the establishment of which we gave an account in a former number of this *Review* (April, 1876, vol. x. p. 440). It will be remembered that the jurisdiction of the new courts covered not only civil cases "between natives and foreigners, and between foreigners of different nationalities," but that the Khedive "consented to place within the scope of their cognizance transactions of foreigners with the Egyptian government itself, and its several departments or administrations, or with his 'dairas,' or private estates."

Certain bond-holders, whose bonds were secured on the "dairas," sued the Khedive in the new courts, and obtained judgment and execution. It appears, however, that on the 6th of April last "the Egyptian government announced by decree that it postponed for three months the payment of its obligations; and, on the 8th of the following month, the Khedive ordered the consolidation, not only of the debts of his government, but of his private

debts; namely, the loans and bonds of the daïra." Relying on these decrees, the Khedive has protested against the action of the courts, and resists the execution of its judgment, on the ground that these tribunals might, "in cases where, as at present, certain legislative measures are demanded by expediency or public necessity, prevent him from being able, in the exercise of an inalienable right and duty of his government, to provide for these interests by timely arrangements." The courts have refused to yield to the Khedive's contention, and the points in dispute have been submitted to the Powers.

## INDIA.

A SHARP and somewhat amusing contrast between ancient and modern notions of law is afforded by a recent case of attempted suicide in India.

"A Brahman of the Brahmins' claimed a debt or a concession from an adversary. His importunities being of no avail, he at last avowed his intention of sitting in 'dharna' at the door of the other until his demand should be complied with or Heaven release him from his sufferings, and so cast the blood of the holy upon the head of the obdurate. He accordingly 'sat;' but the operation becoming tedious after a time, and not producing the desired result, he proclaimed his determination to live no longer on the earth with the stiff-necked. With his janeo in one hand, and dust from the threshold of his oppressor in the other, the Brahman forthwith leaped head-foremost into the village well. Seized with terror and remorse, his opponent now rushed forth to the mouth of the fatal well, and, with hands clasped, in contrite tones besought his injured victim to avail himself of the rope thrown down to save him, and only to come up, when all would be well. Thus adjured, the holy man consented to be pulled to the surface of the earth again: whereupon he was seized by his adversary, and handed over to the police on a charge of attempting to commit suicide." — *Pall Mall Gazette*.

Sir Henry Maine, who has found in the Brehon laws remains of a procedure among the ancient Irish analogous to sitting in "dharna" (*Early Hist. of Institutions*), did not naturally discover any trace of such a summary mode of relief from a situation so full of distressing constraint as this must have been to the debtor. Indeed, if we remember rightly, he does not indicate what steps it is supposed a debtor might take. An experience of Adamnan, Abbot of Hy, would seem to show how such a pressure might be withstood:—

"The Irish life of Adamnan represents the saint as 'fasting against Irgalach,' immersed in the River Boinn, and overcoming him by deceit. This system of fasting against an obnoxious individual was a favorite mode with the Irish ecclesiastics of bringing down visitations upon their enemies. Irgalach resisted the influence of St. Adamnan's fasting by doing the same himself; until Adamnan, by inducing one of his people to personate him, put Irgalach off his guard, and thus got the mastery over him." — *Reeves' Life of St. Columba*.

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## THE CIVIL SERVICE OF THE UNITED STATES.

BROUGHT up on the sea-coast, and familiar always with those that go down to the sea in ships and do business in great waters, we early learned that no ship could ever be built in a manner absolutely satisfactory to the neighbors; and it has been our occasional amusement, in succeeding years, to observe how uniformly the fleets of every nation are the subjects of animated contumely, whenever brought to the attention of parliamentary critics. Yet the naval architect has experience. He knows what a vessel should be; has perhaps seen just such a one as he projects; and he knows with accuracy what are the qualities of the materials he has to work with. But the builders of our ship of State not only had never seen just such a work as they had to construct, but they knew that the materials with which they were to operate were human beings, present and to come, and that they could not, in the nature of things, be calculated on with certainty. They were, and would be, not chessmen of settled values, but men of various characters, more or less firm, intelligent, generous, and patriotic; sometimes fitted for their places, sometimes fit for other places, and indeed now and then fit for none in any well-appointed craft. They launched their vessel amid even more adverse criticism than is usual; and, though she proved staunch, trim, and well-fastened, she was soon found by a majority of her numerous part-owners to need substantial repairs, and indeed has needed and received such at intervals ever since, as might well have been anticipated. It was not her shortcomings, but her



success, that called for admiration. It was expected that she would encounter storm and stress ; that she would often be severely strained ; and, indeed, by many of her friends even, that she would absolutely founder. The wonder is that she has survived, and, on the whole, so prosperously.

The present difficulty among the part-owners is a very serious one. They cannot set her out, like a child's boat, and tell her to cross the pond empty. Her voyage is to be over a tempestuous ocean. She must be officered and manned. How, is the problem. Shall every new captain dismiss his whole ship's company and procure a fresh one, or shall the owners keep experienced officers and able seamen permanently attached to the vessel ? It is argued, on the one hand, that the captain is largely responsible for the success of the ship, and should appoint his men ; and, on the other, that the owners have the deeper interest in her safety, and should see that their friends control her in part. One party fears " old fogies ; " the other, Captain Kyd. There is great room for apprehension. There always was, and always must be ; not with this ship alone, but with all such. A ship is made to sail the sea, and her existence is one of constant peril. Government is a human invention : every form of it has its peculiar difficulties and dangers ; and so it will ever be. History repeats itself. Diocletian gave the United States the example of absolute forgiveness of the defeated party in a civil war. That which hath been is now, and that which is to be hath already been. We must be continually alert, and never forget that a free government can only be maintained by the sleepless vigilance of free men. But we fear that the cry of " old fogy " is growing personal, and take refuge under the national shield.

The Constitution provides that the President " shall nominate, and by and with the advice and consent of the Senate shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not otherwise herein provided for, and which shall be established by law ; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments." And that " The President shall have power to fill up all vacancies that may happen during the recess of the

Senate, by granting commissions which shall expire at the end of their next session."

The laws direct that the great number of inferior officers shall be appointed by collectors of customs and similar official persons, with the consent and under the direction of the several heads of the departments to which they belong. It was determined by the first Congress in 1789, by a vote in the House of 34 to 20, and by the casting vote of Vice-President Adams in the Senate, that the intent of the Constitution was to vest the power of removal from office in the President alone; and this interpretation was substantially acquiesced in till the collision occurred between Congress and President Johnson in 1867.

The administration of the government for its first forty years proved, according to Hamilton's criterion, the excellence of the plan on which it was built.

The practice had steadily proceeded upon the true principle of making appointments depend upon the officer's honesty, capacity, and fidelity to the Constitution, probably not without at least occasional reference to his political opinions, and continuance in office upon good behavior, and without reference to such opinions. This practice has always prevailed, so far as the regular military and naval officers are concerned; and in consequence of this, and of the system of carefully educating cadets for such offices, those functionaries have been and are held in high respect, and are to a remarkable degree able, honorable, and patriotic. The last thing we fear among them is any thing resembling pecuniary dishonesty.

It is remarkable that these officers held their places by a tenure similar to that of the principal civil officers, until the year 1862.<sup>1</sup>

We do not know why they did not find themselves "the vassals of vicissitude" with the others; but their exemption has

<sup>1</sup> The statute, 1862 (12 U. S. Stat. 196), requested the President to dismiss any such officer, when such dismissal would, in his judgment, promote the public interest. But, in 1865, another act (13 Stat. 489) provided that any such officer, so dismissed, might demand a court-martial; and if such court did not award death or dismissal, the order of dismissal should be void.

In 1866 the existing law was passed. It (14 Stat. 92) provides that "No officer in the military or naval service shall, in time of peace, be discharged from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof."

vastly contributed to the safety of the country, unless, indeed, we consider, that, if they had been involved in the general disaster, the public excitement would have been so deep and effective that we should not now have occasion to consider the subject of this article.

In the year 1829 President Jackson and the leaders of his party astonished the country by a breach of official trust so stupendous that it had been supposed impossible for men in high official place in the republic, — the arbitrary removal of civil officers in enormous numbers on account of their political opinions, or from motives of personal and partisan favoritism. This was the American Eve of St. Bartholomew: a sudden and treacherous massacre by a chief magistrate of a portion of his own people, not for wrong action, but for heretical opinion.

Some passages from Parton's "Life of Jackson" are pertinent here, as showing the practical working of the new device.<sup>1</sup>

"It cannot be denied, that, in the first month of this administration, more removals were made than had occurred from the foundation of the government to that time. It cannot be denied that the principle was now acted upon, that partisan services should be rewarded by public office, though it involved the removal from office of competent and faithful incumbents. Colonel Benton will not be suspected of overstating the facts respecting the removals, when he admits that their number, during the year 1829, was 690. He expresses himself on this subject with less than his usual directness. His estimate of 690 does not include the little army of clerks and others who were at the disposal of some of the 690. The estimate of 2,000 includes all who lost their places in consequence of General Jackson's accession to power; and, though the exact number cannot be ascertained, I presume it was not less than 2,000. Colonel Benton says, that, of the 8,000 postmasters, only 491 were removed; but he does not add, as he might have added, that the 491 vacated places comprised nearly all in the department that were worth having. Nor does he mention that the removal of the postmasters of half a dozen great cities was equivalent to the removal of many hundreds of clerks, book-keepers, and carriers."<sup>2</sup>

<sup>1</sup> The quotations from Parton are here taken from the appendix to Mr. Jenckes's Report to the House of Representatives on the Civil Service in 1868. Reports of Committees, 1867-68, p. 8 *et seq.*

<sup>2</sup> This will remind the reader of Macaulay's essay on the Earl of Chatham, in which he thus speaks of the proceedings of the party of "the King's friends," under the administration of Bute and George Grenville: —

"A persecution, such as had never been known before, and has never been known

"Terror, meanwhile, reigned in Washington. No man knew what the rule was upon which removals were made. No man knew what offences were reckoned causes of removal, nor whether he had or had not committed the unpardonable sin. The great body of officials awaited their fate in silent horror, glad, when the office-hours expired, at having escaped another day. The gloom of suspicion (says Mr. Stansbury, himself an office-holder) pervaded the face of society. No man deemed it safe and prudent to trust his neighbor; and the interior of the department presented a fearful scene of guarded silence, secret intrigue, espionage and tale-bearing. A casual remark dropped in the street would, within an hour, be repeated at head-quarters; and many a man received unceremonious dismissal who could not, for his life, conceive or conjecture wherein he had offended.

since, raged in every public department. Great numbers of humble and laborious clerks were deprived of their bread, not because they had neglected their duties, nor because they had taken an active part against the ministry, but merely because they had owed their situations to the recommendation of some nobleman or gentleman who was against the peace [with France and Spain]. The proscription extended to tide-waiters, to gaugers, to door-keepers. One poor man, to whom a pension had been given for his gallantry in a fight with smugglers, was deprived of it, because he had been befriended by the Duke of Grafton. An aged widow, who, on account of her husband's services in the navy, had, many years before, been made house-keeper to a public office, was dismissed from her situation, because it was imagined that she was distantly connected by marriage with the Cavendish family."

And, as illustrative of the intellectual character of the man who could inaugurate such a ruinous policy, we quote from the same essay what is said of Grenville with reference to the "Stamp Act:"—

"While Pitt was thus absent from Parliament, Grenville proposed a measure destined to produce a great revolution, the effects of which will long be felt by the whole human race. We speak of the act for imposing stamp-duties on the North American colonies. The plan was eminently characteristic of its author. Every feature of the parent was found in the child. A timid statesman would have shrunk from a step of which Walpole, at a time when the colonies were far less powerful, had said, 'He who shall propose it will be a much bolder man than I.' But the nature of Grenville was insensible to fear. A statesman of large views would have felt that to lay taxes at Westminster on New England and New York was a course opposed, not indeed to the letter of the statute-book, or to any decision contained in the Term Reports, but to the principles of good government, and to the spirit of the Constitution. A statesman of large views would also have felt that ten times the estimated produce of the American stamps would have been dearly purchased by even a transient quarrel between the mother country and the colonies."

"But Grenville knew of no spirit of the Constitution distinct from the letter of the law, and of no national interests except those which are expressed by pounds, shillings, and pence. That this policy might give birth to deep discontents in all the provinces, from the shore of the Great Lakes to the Mexican Sea; that France and Spain might seize the opportunity of revenge; that the Empire might be dismembered; that the debt—that debt with the amount of which he perpetually reproached Pitt—might, in consequence of his own policy, be doubled,—these were possibilities which never occurred to that small, sharp mind."

"An old friend of General Jackson was in Washington this summer. He wrote on the 4th of July to a friend : —

"I have seen the President, and have dined with him, but have had no free communication or conversation with him. The reign of this administration — I wish another word could be used — is in very strong contrast with the mild and lenient sway of Madison, Monroe, and Adams. To me it feels harsh ; it seems to have had an unhappy effect on the free thoughts and unrestrained speech which have heretofore prevailed. I question whether the ferreting out treasury-rats and the correction of abuses are sufficient to compensate for the reign of terror which appears to have commenced. It would be well enough if it were confined to evil-doers ; but it spreads abroad like a contagion : spies, informers, denunciations, — the fecula of despotism. Where there are listeners, there will be tale-bearers. A stranger is warned by his friend, on his first arrival, to be careful how he expresses himself in relation to any one or any thing which touches the administration. I had hoped that this would be a national administration, but it is not even an administration of a party. Our republic henceforth will be governed by factions ; and the struggle will be, who shall get the offices and their emoluments, — a struggle embittered by the most base and sordid passions of the human heart."

"So numerous were the removals in the city of Washington, that the business of the place seemed paralyzed. In July, a Washington paper said : —

"Thirty-three houses which were to have been built this year have, we learn, been stopped, in consequence of the unsettled and uncertain state of things now existing here ; and the merchant cannot sell his goods or collect his debts, from the same cause. We have never known the city to be in a state like this before, though we have known it for many years. The individual distress, too, produced in many cases by the removal of the destitute officers, is harrowing and painful to all who possess the ordinary sympathies of our nature, without regard to party feeling. No man, not absolutely brutal, can be pleased to see his personal friend or neighbor suddenly stripped of the means of support, and cast upon the cold charity of the world, without a shelter or a home. Frigid and insensible must be the heart of that man who could witness some of the scenes that have lately been exhibited here, without a tear of compassion or a throb of sympathy. But what is still more to be regretted, is, that this system, having been once introduced, must necessarily be kept up at the commencement of every presidential term ; and he who goes into office, knowing its limited and uncertain tenure, feels no disposition to make permanent improvements, or to form for himself a permanent residence. He therefore takes care to lay up what he can during his brief official existence, to carry off to some more congenial spot, where he means to

spend his life, or re-enter into business. All, therefore, that he might have expended in city improvements is withdrawn; and the revenue of the corporation, as well as the trade of the city, is so far lessened and decreased. It is obviously a most injurious policy as it respects the interests of our city. Many of the oldest and most respectable citizens of Washington, those who have adhered to its fortunes through all their vicissitudes, who have "grown with its growth, and strengthened with its strength," have been cast off, to make room for strangers, who feel no interest in the prosperity of our infant metropolis, and who care not whether it advances or retrogrades.'

"As a general rule, the dismissal of officers was sudden and unexplained. Major Eaton, for example, dismissed the chief clerk of the War Department in the terms following:—

"Major —: The chief clerk of the department should, to his principal, stand in the relation of a confidential friend. Under this belief, I have appointed Dr. Randolph, of Virginia. I take leave to say, that, since I have been in this department, nothing in relation to you has transpired to which I would take the slightest objection, nor have I any to suggest.'

"These facts will suffice to show that the old system of appointments and removals was changed, upon the accession of General Jackson, to the one in vogue ever since, which General Marcy completely and aptly described, when he said that to the victors belong the spoils. Some of the consequences of this change are the following:—

"1. The government, formerly served by the *élite* of the nation, is now served to a very considerable extent by its refuse. That at least is the tendency of the new system; because men of intelligence, ability, and virtue, universally desire to fix their affairs on a basis of permanence. It is the nature of such men to make each year do something for all the years to come. It is their nature to abhor the arts by which office is now obtained and retained. In the year of our Lord 1859, the fact of a man's holding office under the government is presumptive evidence that he is one of three characters; namely, an adventurer, an incompetent person, or a scoundrel. From this remark must be excepted those who hold offices that have never been subjected to the spoils system, or offices which have been 'taken out of politics.'

"2. The new system places at the disposal of any government, however corrupt, a horde of creatures in every town and county, bound, body and soul, to its defence and continuance.

"3. It places at the disposal of any candidate for the presidency, who has a slight prospect of success, another horde of creatures in every town and county bound to support his pretensions. I once knew an apple-woman in Wall Street, who had a personal interest in the election of a President. If *her* candidate gained the day, her 'old man' would get the place of

porter in a public warehouse. The circle of corruption embraces hundreds of thousands.

"4. The spoils system takes from the government employé those motives to fidelity which in private life are found universally necessary to secure it. As no degree of merit whatever can secure him in his place, he must be a man of heroic virtue who does not act upon the principle of getting the most out of it while he holds it. Whatever fidelity may be found in office-holders must be set down to the credit of unassisted human virtue. In a word, the spoils system renders pure, decent, orderly, and democratic government impossible. Nor has any government of modern times given such a wonderful proof of inherent strength as is afforded by the fact, that this government, after thirty years of rotation, still exists.

"At whose door is to be laid the blame of thus debauching the government of the United States? It may, perhaps, be justly divided into three parts: First, Andrew Jackson, impelled by his ruling passions, resentment and gratitude, *did* the deed. No other man of his day had audacity enough. Secondly, the example and politicians of New York furnished him with an excuse for doing it. Thirdly, the original imperfection of the governmental machinery seemed to necessitate it. As soon as King Caucus was overthrown, the spoils system became almost inevitable, and perhaps General Jackson only precipitated a change which sooner or later must have come.

"While the congressional caucus system lasted, confining the sphere of intrigue to the city of Washington, politicians did not much want the aid of the remote subordinate employés of the government. But when the area of President-making was extended so as to embrace the whole nation, every tide-waiter, constable, porter, and postmaster, could lend a hand. Well, then, do not burst with virtuous rage until you have duly reflected upon the fact, too well known, that the average disinterested voter can only with difficulty be induced even to take the trouble to go to the polls and deposit his vote. Without the stimulus of interested expectation, how is the work of a presidential campaign to be got done? Who will paint the flags, and pay for the Roman candles, and print the documents, and supply the stump?

"The patriotic citizen, do you answer? Why does he not do it, then?

"The spoils system, we may hope, has nearly run its course. It is already understood that every service in which efficiency is indispensable must be *taken out of politics*; and this process, happily begun in some departments of municipal government, will assuredly continue.

"The first century of the existence of a nation which is to last thirty centuries or more, should be merely regarded in the light of the 'Great Republic's' experimental trip. A leak has developed itself. It will be stopped."

Beyond its immediate and disastrous effects upon individuals, the blow to our system of administration was not immediately and conspicuously calamitous. The business of the country went on as before, and without serious jarring. But when, twelve years afterwards, the party which had inflicted it went out of office, it was seen with profound regret by all thoughtful patriots, that the party which rose upon its defeat had not the power — perhaps not the will — to avoid its pernicious example ; and the breach of public trust, at first so shocking, seemed more tolerable, as having the specious appearance of just retaliation, and at length became systematic and regular, as the murder of the Sultan's brothers returns upon that Sultan's own children.

And so the civil service, the most important human complement of the written frame of government, went, to use the favorite phrase in the navy, to the Devil !

At the outset of the government, and in the appointment of its even then numerous officers, it was almost of necessity that the President and the heads of departments should resort for information and advice to the senators and representatives of the different States. Down to the period of President Jackson, we are not aware that any serious evil had resulted from that practice. And the civil service was attractive to worthy men, and its members were respected in society as they should be.

But, since that era of disaster, a system has grown up under which the senators and representatives of the dominant party, at the time, have long claimed the right to control all the appointments in their several States, sometimes as inherent in each delegation as a body, and in other cases as the personal perquisite of individuals ; as, for instance, all should unite in the appointment of a district attorney, while each one should have a certain number of inspectorships, clerkships, and the like, as his own appanage. Thus the great principles of obedience to law, of publicity in national affairs, and consequent responsibility, were ignored or forgotten.

Powers vested in the executive thus passed to members of the legislative body, — to men who, while holding an official character, found themselves in positions to exercise powers independent of that character ; and it was not long before those powers began to be exercised, as Jackson used his, for the personal and temporary advantage of the possessors, or by way of



substantial bargain and sale, till now, in the language of Mr. Evarts, "the placemen make the Congressmen, and the Congressmen the placemen, and both leave the people out." And we find that not only no one is responsible for the appointment of an officer in the custom-house or post-office, but that it would require an investigating committee to discover by what precise means he obtained it, or when or by what means he may find himself deprived of it. This is a state of things well calculated to excite the liveliest alarm, especially when we see what an effect a permanent, respectable body of officers in each State might have had in averting the late national calamity. What a difference it would have made to the stability of the government if its officers had felt themselves to be such in reality, instead of being the temporary and feeble slaves of a faction; dependent for their bread, not upon the people and the government they were in positions to serve, but upon, perhaps, the open enemies of that people and that government.

The Constitution has been silently changed, as in the conspicuous example of the electoral college or colleges, whose powers, intended to be of the grandest character and the highest responsibility, and to be exercised with the most serious deliberation, have been reduced to the duty of reading the newspapers, and recording the result of the action of the party to which they belong. Their real work is done by delegates, in number twice as great as the legal electors, chosen without law, not by the whole people, but by a party, who meet at a place designated by a committee unknown to the law, and, in a manner more or less tumultuary, designate the persons for whom they wish the party they represent to vote for the two great offices; and are good enough, also, to lay down a "platform" of political principles, which is expected to be a light to their path, if elected, and a guide to the action of the coming Congress, substituting thus a kind of prophetic legislation for the action of our representatives after debate. And it is not uncommon for members of Congress, in open session, to cite such a platform as actually controlling the conduct of members of the party who laid it down. But even before this tumultuary deliberation and consultation, meetings are openly held on the days and nights immediately preceding a meeting of such a convention, by self-selected leaders, who arrange the "platform," and do what they can to settle, in

advance, the nominations to be made; thus illustrating the proverb, that Power is perpetually stealing from the many to the few. The other and various wheels within wheels we leave to the imagination, perhaps assisted by the memory, of the reader.

Naturally the grave attention of the public has been turned to this subject, and as naturally all efforts to amend the obvious evils have met with much open, and more covert, resistance. The late Hon. T. A. Jenckes, of Rhode Island, distinguished himself in the most honorable manner by his able and fruitful examination and exposition of the perils and abuses to be combated, and also of the manner in which similar evils have been met and overcome in other countries.

In his message to Congress, Dec. 5, 1870, President Grant said: "The elevation and purification of the civil service of the country will be hailed with approval by the whole people of the United States;" and on the third day of the next March a law was passed, which authorized the President, with the aid of persons of his own selection, to make rules for that object. He selected seven gentlemen eminently qualified for the duty; and Mr. George William Curtis was their chairman.<sup>1</sup>

Rules were accordingly made, and laid before Congress by the President, Dec. 19, 1871, and that body, in two separate sessions, made appropriations for carrying them into effect. We give an abstract of those rules, taken from the admirable address of Mr. Dorman B. Eaton, of New York, delivered at Detroit, in May, 1875, as follows:—

1. Political assessments, which have always been imposed in aid of the mercenary interests of the most partisan elements in our politics, and which are incompatible with integrity and the requisite independence on the part of the public officers, were forbidden; but leaving every citizen alike free to contribute as much as he should wish to promote his political opinions.

2. The public places were so divided as to bring a few of those of the higher grade, which might fairly be claimed to represent the policy of those in power, and the principles of the dominant party, within the range of that unconditioned appointing power of the President, that must, it is conceived, be so far exercised in reference to such policy and principles as may be needful to secure harmony and vigor in the administration; but in

<sup>1</sup> Address of Mr. Dorman B. Eaton. "Journal of Social Science" for May, 1876.

all the grades below, which were classified and grouped in aid of regular promotions, the places were required to be filled by selections from among a few, ascertained by tests of character and qualifications which, in their nature and application, were irrespective of political opinions.

3. These tests were, first, the best attainable of good reputation and honesty ; and next, a fair public competitive examination of the several applicants, as to their attainments and capacity in those particulars which are essential to the proper discharge of the respective positions for which they might compete. These competitive examinations extended both to those seeking admission to the service and those seeking promotion.

4. Selections to fill vacancies, and for promotions, were to be made by the superior officers having the appointing power, from among a limited number of those standing highest on the lists, as the result of competition. The appointment was first to be made only for the probationary period of six months, final appointment being contingent upon good behavior and capacity demonstrated within that period.

5. To insure the necessary vigor and authority in the executive, and to avoid any suspicion of an intention to create a permanent term of office, the existing term was left undisturbed ; and there was no further restriction placed upon the authority of removal than the pledge in the rules, that "such power will not be arbitrarily exercised, . . . nor will any person be removed for the mere purpose of making room for any other person."

6. That the examinations were to be so frequently conducted that all desiring to compete should have a convenient opportunity, and that there should always be a considerable number of those of approved merit and capacity upon the lists, from whom appointments and promotions could be promptly made. The examinations were to be made by competent boards of examiners in the several departments, subject to the non-partisan supervision of the Civil Service Commission, whose duty it was to take care that the questions were well selected, that the processes were fair, and that all grievances should be exposed and redressed. Mere employes were not subject to examination ; and there was a class of subordinate clerks, such as counters, and mostly females, to which they had only a restricted application.

7. To give scope for honorable ambition, and reward to unobtrusive merit, as well as to cultivate the spirit of just subordination, original admission to that part of the service which must be reached by competition was always to be to the lowest grade ; and promotions were to be from grade to grade in the same department and group, subject to such reasonable right of transfer as the good of the service might require.

8. Records were to be, and were, kept of every examination, and of the basis of rank assigned in the competitions, so that at any time, how-

ever distant, it will be possible to review the justice of the marking and grading of every person examined, in each subject to which the examination may relate.

9. To check the abuse of Federal officers interfering so much in State politics, it was provided that no such officer should hold any State office at the same time that he held a Federal office.

10. Just above those grades to which such competition was applied (and which included the great body of the clerical and official force of the government), and just below that small number of higher political officers as to which executive discretion was not conditioned, there was a number of officers, such as collectors, surveyors, certain postmasters, &c., not wholly exempt from the rules, but yet to which competition was not extended. The nomination of most of these officers was subject to the confirmation of the Senate, and to such it will be found very difficult to apply strict competition. It is hardly possible for the President to secure reform as to such appointments, without either the hearty co-operation of the Senate, or the aid of a public opinion so stern and coercive that it shall help to arrest the evils of the old system, by which such appointments are substantially allotted, as so much perquisites or patronage, among the liberal senators.

Mr. Eaton considers that the extension of the rules, in the first instance, to the last-named class of officers, was rather too bold a step in the existing state of public opinion, and that it was not wise to require the President to appoint from a small list certified by a head of department, who himself acted upon the certificates of a board of examiners. And he says, that it was in the application of that portion of the rules that the unfortunate difficulties arose which led to the resignation of Mr. Curtis. Mr. Eaton himself was made a member of the commission in April, 1873; and it afterwards recommended rules, which were promulgated by the President, to the following effect:—

1. A rule requiring written evidence of fitness in reference to every appointment before it should be made, and the preservation of such evidence in the proper department.

2. The rule already cited, as to the tenure of office, and prohibiting removals for the mere purpose of making room for others.

3. A new rule, providing for examinations in each of the five separate districts into which the country was divided, with such arrangements for examination at several convenient places in each district, and for allowing appointments to be made from the competitive lists of each, that the officers could be fairly apportioned over the whole country. This

removed the formidable objection, that the rules tended to centralization, and encouraged office-seekers at Washington, so long as all examinations must be held there.

4. Appropriate rules for taking the whole light-house service of the country out of politics and favoritism, and for testing by impartial methods those faithful qualities and special capacities so essential in that branch of the service, upon which the safety of life and property so greatly depend.

The commission then obtained reports from the heads of all the bureaus and offices in the cities of Washington and New York, where alone the rules had been applied; and in April, 1874, made a full statement to the President of the methods and results of the reform so far, and the President transmitted it to Congress, with a declaration of his approval of the system and its practical effects, and requesting a sufficient appropriation for the continuance of the work. The amount needed was twenty-five thousand dollars a year: a comparatively insignificant sum, and one to which we believe no serious objection was ever made; but neither that nor any other sum was granted. Mr. Eaton, to whose work we have been so much indebted, explains very clearly how the apathy and covert hostility of Congress allowed, or rather forced, the destruction of the system; and points out with luminous vigor the political causes of that apathy and hostility, and the reasons, also, of the defeats of the dominant party, — not only of those which had already occurred, but of those which were to come.

We have, indeed, only to recommend every person interested in this subject, — and that category, we are sure, will include every reader of this *Review*, — to study his admirable address. It has superseded much that would naturally have found place here, and so well, that we can only rejoice at it.<sup>1</sup> The plan has so far

<sup>1</sup> We give here an extract from Mr. Eaton's essay, which shows not only the operation of the rules, but their transparent necessity: —

"The Cabinet itself, at a special meeting, formally adopted the following language in the Report (of April 15, 1874, p. 42), as fairly stating the results of the rules; viz., —

"1. They have, on an average, where examinations apply, given persons of superior capacity and character to the service of the government, and have tended to exclude unworthy applicants.

"2. They have developed more energy in the discharge of duty, and more ambition to acquire information connected with official functions, on the part of those in the service.

"3. They have diminished the unreasonable solicitation and pressure which

failed; but the strong feeling of the country remains, and will grow in extent and vivacity, till the reform so absolutely vital to the very being of the nation shall have been accomplished. There is now no real issue between the two great parties of the country. The late election was, as prophesied by Mr. Webster, not a contest over differences of policy or principle, but a mere "scramble for office." It cannot, we think, be very long before this question of the reform of the civil service will be the one absorbing issue with reference to which parties will have to range themselves.

This nation thoroughly believes in republican government, and such government is impossible with our present system. To say that the people will not see this, is to say, that in a hundred years they have not learned any thing on a subject that has occupied their best intelligence during all that period, and that their fathers could govern them in advance more wisely than they can now govern themselves. That can hardly be true of so young a nation, made up of free, active, successful, and enterprising men. Some plan will be devised to avert obvious and imminent ruin. The dissemination of dishonesty is not yet so wide-spread as to require the Greek institution of *dikasteries*. Twelve men in a jury-box are still considered safe to a reasonable extent; as much so, perhaps, as ever: in saying which, we refer to juries generally in the country, and not merely to those of New England. And though our newspapers, in the line of their duty, disclose too many instances of public and private criminality, we have only to think for a moment of the vast amounts of property depend-

numerous applicants and their friends, competing for appointments, have before brought to bear upon the departments in the direction of favoritism.

"4. They have, especially where competition applies, relieved the heads of departments, and of bureaus, to a large extent of the necessity of devoting, to persons soliciting places for themselves or for others, time which was needed for official duties.

"5. They have made it more practicable to dismiss from the service those who came in under the civil service examinations, when not found worthy, than it was, or is, to dismiss the like unworthy persons who had been introduced into the service through favor or dictation.

"6. They have diminished the intrigue and pressure, before too frequent, for causing the removal of worthy persons for the mere purpose of bringing other, perhaps inferior, persons into the service.

"7. And for these reasons, those officers think that it is expedient to continue the reform upon the method upon which it has proceeded, making from time to time such modifications in details as experience may show to be most useful."

ing always upon human integrity ; of the enormous number of men who are, to a greater or less extent, the fiduciary depositaries of that property ; of the mutual confidence that makes immense trade possible and profitable ; and of the actual serenity of the community generally, except in regard to the very evils we have been contemplating, — to feel that, while vice abounds here as everywhere, still there is virtue enough — it may not be more than enough, but still sufficient — to prevent us from death by general demoralization, or what physicians call *marasmus*.

The fact that General Jackson was triumphantly elected to a second term of office was and is discouraging. His military success had blinded the country. But, really, his defeat at New Orleans would have been nothing to the calamity of his political success. Large bodies move slow. It has taken forty years of misgovernment to awaken the people ; but they are now awake, and they will soon show it.

One of the great practical difficulties in the way of improvement is the superstitious veneration, which is affected by those who wish to revel in favoritism, for the doctrine of the Congress of 1789, so long acquiesced in, and even admitted to be settled by many who regretted its adoption. But in 1866 the law was passed which prevents military and naval officers from removal in time of peace without court-martial, and this law was approved by President Johnson ; and when, afterwards, in 1867, the first act regulating the tenure of civil office was passed over his veto by the necessary two-thirds vote of each branch of Congress, and upon his impeachment by the House before the Senate, the constitutionality of this law was solemnly affirmed by the latter, by a vote of 35 to 19, certainly something had been done to unsettle that doctrine. And more was done, when, in a time of general harmony among the members of the administration, the amendatory act of 1869 was passed, with the approval of President Grant. And this act has remained in force ever since.<sup>1</sup>

<sup>1</sup> The first section of the act of 1867 was as follows : " That every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate, and every person who shall hereafter be appointed to any such office, and shall become duly qualified to act therein, is and shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided : *Provided*, that the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster-General, and

Certainly such deliberate action *pro re nata* may well be held to overcome a decision made by legislators, however respectable, who were acting upon mere theory and without practical experience. But this applies chiefly to the officers appointed by the President alone, or with the consent of the Senate; and, while they are sufficiently numerous, there are still immense numbers appointed under the direction of the heads of departments and otherwise, over whom the absolute power of a law of Congress is admitted. In regard to the number of the officers who were affected by President Johnson's claim of the right of removal, the managers of the impeachment showed that they were 41,558, and that the total of their emoluments was \$21,180,736.87 annually.<sup>1</sup> And it

the Attorney-General, shall hold their offices respectively for and during the term of the President by whom they may have been appointed, and one month thereafter, subject to removal by and with the advice and consent of the Senate." The second section provided, that when any officer (except judges) should, during a recess of the Senate, be shown, by evidence satisfactory to the President, to have been guilty of misconduct, or to be incapable, he might in his discretion suspend him from office, and designate a person to fill his place till action should be taken by the Senate; and that, within twenty days after the meeting of that body, the President should report to it his reasons for the removal, and the name of the person so designated. If the Senate concurred, the President might remove the officer, and, with its advice and consent, appoint his successor. If it refused to concur, the officer resumed his office.

The act of 1869 (now in force, R. S. sect. 1767) is, in its first section, similar to that of the previous act, except that the proviso is omitted.

Its second section (1768) empowers the President to suspend officers during a recess, and to designate persons to perform their duties till the end of the next session, if not sooner removed, and requires the President to nominate persons, within the first thirty days of that session, to all vacant and suspended offices (he is not required to give reasons for any suspension); and, if the Senate refuse to concur in any appointment in the place of a suspended officer, then the President shall nominate another, and so on.

The third section (1769) authorizes the President to fill, during the recess, vacancies occasioned by death, resignation, or expiration of official term, by commissions to expire at the end of the next session. If they are not filled during the session, with the advice and consent of the Senate, then the offices remain in abeyance till so filled, and their duties shall be performed by other officers.

It would seem that, under sections 1767 and 1768, a suspended officer would resume his office, if it were not duly filled at the next session. But this would hardly be a great privilege, especially if, for example, he should be removed in April, 1877, and the next session should terminate in August, 1878. The usual term of office, where fixed, is four years; perhaps the most injudicious and unfortunate within the possibilities, as it seems to invite fresh appointments by each new President.

<sup>1</sup> Mr. Jenckes, in his later report, hereinafter cited, gives the whole number of officers of the civil service as more than 53,000, and their annual compensation as about \$30,000,000. There are more than 50,000, exclusive of those requiring con-



may not be altogether digressive to remark here, that the number of assessors of internal revenue, with salaries of \$1,500 each and fees, was 226 ; of collectors of that branch, with similar pay, 215 ; and of deputy collectors, with \$1,500 annual pay, 216, while a late return of the internal revenue shows that the amount collected in one year, in a single State, was upwards of \$23,000,000. It is true this State, Illinois, paid by much the largest amount collected in any one ; but the aggregate in all the States largely exceeded \$100,000,000. And this tax was particularly unwise in one respect : upon distilled liquors its rate was seventy cents a gallon, — more, for instance, in the case of whiskey, than twice its cost to the distiller, — so that the temptations to fraud were excessive, such as no judicious lawgiver would think of for a moment, after he had done his best to weaken the positions and impair the quality of his assessing and collecting agents. Is it wonderful, that, under such circumstances, the country should ring with the cry of "Whiskey Ring!" In what country on earth would men in general be safe with such temptations, and men without wealth, and no assurance of even the means of subsistence, and where the course of dishonesty was not only the easier, but even the safer. The exciseman's duty is always disagreeable ; his enemies are numerous, and of his own neighborhood ; and, if he becomes particularly unpopular, the member of Congress to whom he owes his appointment can hardly be the safest dependence. He also lives — perhaps actually, always politically — upon his popularity. Certainly we have less cause to blush at the comparative amount of villany that has been exposed, than at the superlative unwisdom of those to whom we have to intrust our legislation. That with such lawgivers and such neglect of the smallest precaution we have got along so well, and so long, is no small proof of the inherent goodness and sense of the body of the people, and of the strength of our institutions of government. We will now endeavor to extract from the voluminous literature of this subject enough to show, as comprehensively as may be, the achievements of some other countries in the direction of sound and creditable administration.

Mr. Jenckes, from a committee of both branches of Congress

firmation by the Senate. We have not spoken at all of the exceptional cases of judges, who hold office during good behavior. Their position is familiar to our readers.

having charge of this matter, made two excellent reports to the House, with copious and valuable appendices, containing opinions and information regarding it, — one, Jan. 31, 1867, the other, May 25, 1868, — from which most interesting repertory we are constantly tempted to make excerpts which our limits forbid.

It is not surprising that the first Napoleon should have been apparently the earliest European ruler who conceived and put into operation the correct system. With the restoration of the Bourbons, the old abuses were in part restored; but since the revolution which placed Louis Phillippe on the throne, it is remarkable, that, through all the mutations of that wonderful people, the civil service has been permanent and undisturbed. The best account we have seen of the French system was given by Mr. John Bigelow, in 1863, before he was our Minister near the court of France, in a report to the Department of State, which forms one of the appendices to which we have referred.<sup>1</sup>

In 1817,<sup>2</sup> the King of Würtemberg — “one of the wisest princes Germany ever possessed — yielded to the desire of his subjects, and established a faculty of administration at Tübingen, the only university in the kingdom,” and he ordained, —

“1. That hereafter, in awarding such offices as require administrative knowledge, particular regard shall be had to persons who have pursued studies connected with government in the university, and who shall have passed the examinations of the Faculty; and these persons shall be regularly preferred to those who have not acquired these special studies.

“2. The students of administrative science shall pursue such a course of jurisprudence as may be most essential to them; as, for example, the philosophy of positive law; constitutional law; the private law of Würtemberg; administrative law; and the encyclopædia: and the law-students shall, on their part, pursue the most important portion of the administrative course, such as

<sup>1</sup> We copy the following from Mr. Bigelow's report: —

“The French government collects about 2,000,000,000 francs, at an expense of about 850,000,000 of francs, annually. Of the sum thus collected, about 400,000,000 francs are realized from direct taxes, and the rest from indirect taxes; but the *douane* organization is auxiliary to the collection of the whole sum. I do not think so large an amount of revenue is collected by any government in the world, with so small a loss from fraud, as in France; and I attribute the fact, in a large degree, to the method by which the agents of the customs are selected, and the terms upon which they hold their places.”

<sup>2</sup> Report of M. Ed. Laboulaye. Mr. Jenckes's Rep. 1867, App. p. 22.

the encyclopædia of political science, and the practice of administrative service."

In the year 1837 two new chairs were added to the Faculty of the University, — one for the practice of administration, or administrative law applied; the other for political history and statistics. Examinations are regularly made of all candidates for the public service; those who succeed, after serving one year in office, are again examined, to ascertain their practical skill, and, if found up to the mark, are confirmed as public officers.

Baden has pursued a similar system, and Prussia, also, except that Prussia has a second probation, and requires subsequent examination before the candidate is definitively adjudged capable of entering the service of the State.

For results, M. Laboulaye writes to the French government in 1843: "It is only necessary to have travelled in Baden, Würtemberg, and Prussia, to be struck with the perfect arrangements of the administration. In no country has more been accomplished with a less wealth of resources. Würtemberg, especially, is admirable in its public roads and cultivation; and yet it is a country without wealth, and the population of which is only equal to two of our departments."<sup>1</sup>

As we have before stated, the French government had early commenced the formation of an admirable civil service; but, in the reign of Louis Philippe, new progress was made, and now, and for a long time past, that service is a proud monument of political genius. For example, the branch of it composing the revenue service in 1863 employed 27,983 men. All who desire to enter that service (under the Minister of Finance) must be young, healthy, moral Frenchmen, and capable of passing examination in what we should call matters of common-school education. After they are taken into the service, they are assured of employment as long as they conduct themselves well; of promotion, as they may deserve, on the occurrence of vacancies; of pensions when disabled; and of constant supervision by their superiors: so that merit is sure to be recognized, and neglect to be punished. Careful reports are made, extending through all the grades of the service, and records kept, to which constant recurrence may be had to ascertain the character and capacity of any officer. At the end of each year the Director-General — himself trained

<sup>1</sup> Rep. 1867, App. p. 27.

in the service — sends to the Minister of Finance a list of the vacancies likely to occur during the coming year, and a list of the candidates suitable to fill them. When a vacancy occurs, the Director-General selects from this list three names, and from these the Minister makes the appointment. The consequence is, that the force is to the last degree efficient, economical, and respectable, and that such a thing as fraud or corruption is almost unknown among its members. A French custom-house officer cannot be successfully approached with money, or a bribe of any sort.

Among the *minor* consequences of this system was the recent payment of the immense Prussian ransom with a promptitude and freedom from distress which astonished the world.

We have selected, it is true, the most skilfully devised portion of the French civil service ; several other departments are exceedingly well managed, others not so well, while in all there is, of course, room for improvement, as in every thing human. The point is, that a system has been built up in certain branches of administration, the excellence of which not only secures its own continuance or improvement, but must have a powerful effect in improving all its cognate branches.

In England; the first step in the direction of competitive or thorough examination of candidates was taken under the auspices of Mr. Macaulay and Lord Ashburton, and two other commissioners acting under the authority of the East India Company. " In substance, it declared that all vacancies in the Indian civil service should be filled up from among those young men, of whatever rank or condition, who should distinguish themselves most in an open competitive examination, extending over a class of subjects, the knowledge of which was necessary in the administration of Indian affairs."<sup>1</sup>

" At the opening of the session of Parliament in 1854, a promise was made in the Queen's Speech on the occasion, that the home civil service of Great Britain should be thoroughly reorganized, and placed upon substantially the same basis as the East India service. It was understood that Mr. Gladstone, then a member of the government of which Lord Aberdeen was the head, was to submit to Parliament a plan of such reorganization. Owing to a change of ministry, no bill was presented to Parlia-

<sup>1</sup> Rep. 1867, p. 3.

ment; but the subject was not lost sight of by either party in Great Britain.

"The great embarrassment to the administration from the deficiency of the civil service during the Crimean war had convinced every one of the necessity of a thorough reform in their system. The result was, that the government referred the subject of such reform to a large number of eminent men." . . . Upon the opinions expressed by these . . . persons, a report was made to the House of Lords by Sir Charles Trevelyan and Sir Stafford Northcote, fortified by the opinion of Rev. B. Jowett, of Baliol College, Oxford, upon the practicability "of subjecting all candidates for office to preliminary examination, recommending the adoption of a system similar to that already in force in the administration of the East India Company's affairs. No action was taken upon this report; but the government took the initiative steps for the establishment of such a system, by an order in council, dated May 21, 1855. The effect of this order in council has been to give a definite character to the home civil service of Great Britain. Admission into this service is not as open and liberal as into the East India or colonial service,<sup>1</sup> but, to a certain extent, it is the result of competition."<sup>2</sup> Mr. Macaulay, in support of the plan he recommended for the India service, contended that a pass examination, where the question was simply, "Shall A. go to India, or not?" was wholly untrustworthy, and that an examiner might consider the question of trivial importance, and be strongly biassed by a mother's tears, or other disturbing influences, and allow the candidate improper indulgence. But where the question was, which one only, out of four or five young men, should go, and they were to be examined with reference to their qualifications, the examination would be likely to be serious and fair; and the young man who should show himself superior to his fellows in whatever studies might have been required of them, would naturally be superior, not only in intellectual capacity, but in industry and the qualities which that indicates. Of course, among candidates whose studies had been very different, arrangements should be made to give every one an equal chance to show his superiority in his own acquirements.

With reference to the absurd theory, that success in study is generally attended by physical weakness, the accomplished biog-

<sup>1</sup> Rep. 1867, pp. 3, 4.

<sup>2</sup> *Ib.* p. 3.

rapher of Macaulay says: "The Royal Engineers,—the select of the select, every one of whom, before he obtains his commission, has run the gauntlet of an almost endless series of intellectual contests,—for years together, could turn out the best foot-ball eleven in the kingdom, and within the last twelvemonth gained a success at cricket absolutely unprecedented in the annals of the game."<sup>1</sup>

We cannot conclude our compilation better than by giving an extract from an able article in the *North American Review*:<sup>2</sup>—

"No one can be appointed to a public office in Russia without furnishing certificate of college education; and the offices are assigned according to the educational qualifications. Persons without such qualification are not entitled to any grade; but they may fill lower offices, as those of copyists, &c. They may be promoted, however; and there are not a few instances of copyists rising to the highest offices. Russia, however, is far from being purged of the abuses of favoritism; and the public offices swarm with mere parasites. But the principle of the civil service is, at any rate, established upon a sound theory, and the efforts of the present Russian government are strenuously directed to the enforcement of its practice.

"In Greece, no person is admitted to the public service, unless he has graduated at a university. In Italy, Portugal, Spain, Belgium, Holland, Switzerland, as in the German States, qualification tests prevail, together with the system of promotion. As an instance of this, it may be mentioned that three of the foreign ministers residing at present in Washington—namely, those of France, Spain, and Portugal—had all held the post of director of their respective foreign departments previous to their nomination as Ministers to the United States, and served in all the subordinate capacities of the foreign bureau before they attained to their present ambassadorial position.

"Lord Lyons, formerly English Minister at Washington, has recently attained to the most exalted position in his profession, by being appointed ambassador to the Tuileries, after having served from his earliest life in the various subordinate offices of the diplomatic service.

"In the remote East,—in China and Japan,—the persons employed in the government offices are the most learned men of the empires; and the perpetuity of the ancient civilization of these remarkable countries

<sup>1</sup> Life and Letters of Lord Macaulay, vol. ii. p. 292 (Amer. edit.).

<sup>2</sup> Rep. 1868, p. 92. We must not omit, in this connection, to refer to a very impressive article on our subject in the *North American Review* for January, 1871, from the pen of the Hon. Jacob D. Cox, a gentleman known and honored throughout the country.

may be in part accounted for by the character of their civil service organization.

"Even in the mongrel empire of the Sultan of Turkey, a test of qualification is insisted upon. To be sure, a pachaship may be wasted upon a favorite of the Sultana, and the governorship of a large province upon a hanger-on of the Porte, or a partisan of the Grand Vizier; but smaller offices in Turkey and Egypt are generally bestowed only upon qualified candidates, accomplished Greeks, Armenians, or Levantines, who are as remarkable for their proficiency in languages and their general attainments as the Turkish or Egyptian 'head' of a department is generally notorious for his ignorance. In fact, there is hardly a civilized country without a system of examination and promotion in the dispensation of its public offices. Ours is the only country in the world where it does not exist in the civil service."

Our country is undoubtedly in great danger. Its civil officers are the human element in the government. If they are weak, the government is weak. The Constitution has been undermined. The legislative has largely usurped the province of the executive department, and the subordinate members of the latter have allied themselves as largely with members of the former, and corruption is rampant. The remedy must be found in selecting able and just men, publicly known to be devoted to the cause, who shall, in the Senate and House of the national Congress, give themselves, first of all, to the reformation of the civil service. As we have said before, it is no time to despair; nor is it the first time the country has been in great peril. But it is time for Americans to arouse themselves and work; and we believe they will do it. Our ship of State will be given up neither to foreign nor to domestic enemies. But let us each, with Catoian perseverance, reiterate, that "eternal vigilance is the price of liberty."

CHARLES W. STOREY.

EFFECT OF THE REBELLION ON SOUTHERN LIFE  
INSURANCE CONTRACTS.<sup>1</sup>

THE recent decisions of the Supreme Court of the United States, as to the effect of the Rebellion upon contracts of life insurance between corporations of the loyal and citizens of the insurgent States, involve several novel and interesting questions. It had been long settled, that the Rebellion was a geographical public war, attended by all the consequences to individuals and their contracts which result from a war between independent States.<sup>2</sup>

In 1867, the general rule had been declared by Mr. Justice Clifford, who delivered the unanimous opinion of the court, in *Hanger v. Abbott*,<sup>3</sup> that "executory contracts with an alien enemy, or even with a neutral, if they cannot be performed except in the way of commercial intercourse with the enemy, are dissolved by the declaration of war, which operates for that purpose with a force equivalent to an act of Congress."

This statement is abundantly supported by authority, and the rule has been applied in a variety of instances. Thus, a partnership is dissolved by war, and does not merely remain in a quiescent state during the continuance of hostilities; and war terminates a charter-party or contract of affreightment between citizens of two countries which become involved in hostilities with each other.<sup>4</sup>

In *Brandon v. Curling*,<sup>5</sup> Lord Ellenborough said: A marine-insurance policy made in time of peace must be understood with the limitation, "that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer;" and, in another case, the same judge said, "That no contract can properly be carried into effect which was originally made contrary to

<sup>1</sup> *New York Life Ins. Co. v. Statham, Manhattan Life Ins. Co. v. Buck*, Sup. Ct. U. S., Oct., 1876.

<sup>2</sup> *Mrs. Alexander's Cotton*, 2 Wall. 404; *Mauran v. Ins. Co.*, 6 Wall. 1; *Brown v. Hiatts*, 15 Wall. 177.

<sup>3</sup> 6 Wall. 532.

<sup>4</sup> 4 East, 417.

<sup>5</sup> *Griswold v. Waddington*, 16 Johns. 488.



the provisions of law, or which, being made consistently with the rules of law at the time, has become illegal by virtue of some subsequent law, are propositions which admit of no doubt." Mr. Carpenter, in the argument of the cases now under review, observed: "When it is determined to be against public policy to uphold marine insurance after the commencement of hostilities, because the enemy is thereby strengthened, the same principle must be applied to every policy which could have that effect, whether upon property or upon lives. Are not the lives of non-combatants as essential to the prosecution of war as is property?"

These familiar principles, illustrations of which might be multiplied, seem to lead to the conclusion, that the effect of the Rebellion was to put an immediate and complete end to all policies in Northern insurance companies upon Southern lives as soon as war between the two sections began, irrespective of any question as to failure by the assured to pay premiums maturing during its continuance. Or, at least, that any loss upon such a policy, happening during the war, was, by implication, excepted from the terms of the policy, on the ground that it is illegal to insure the life of a public enemy; as it has frequently been held that every life-policy is subject to an exception implied by law against the risk of death by the hands of justice, by the voluntary suicide of a sane person, and by the direct consequences of any illegal or immoral act of a character dangerous to life.<sup>1</sup>

But the court had no occasion to place its decision upon this broad ground; for, in the cases before it, premiums had matured during the Rebellion which the assured had failed to pay, and, by the express stipulations of the policies, non-payment of any premium at the day when payable terminated the contract of insurance.

Upon general principles, as well as by virtue of clauses inserted in all life-insurance policies, punctual payment of future premiums is indispensable to their continuance. Failure to make such payment, caused by inevitable accident, has never been held the subject of equitable relief, even in cases of the utmost extremity. When the assured, about two hours before the expiration of the time limited for the payment of his annual premium, was suddenly stricken with paralysis, and remained in a dying condition until the next day, when he died, these circumstances were held by the

<sup>1</sup> *Hatch v. Mutual Life Ins. Co. of New York*, S. J. C. of Mass., *Ib.*, March, 1876.

Commission of Appeals in New York<sup>1</sup> to constitute no excuse for non-payment, and no ground for holding the company liable. "Although the assured, when about to pay the premium," said the court, "was rendered incapable by the act of God, he is without the rule that relieves a party from the consequences of an omission to do an act rendered impossible by omnipotent power." Many cases hold, as Mr. Justice Strong did in those under review, that "the payment *ad diem* of the second or any subsequent premium is a condition precedent to the continued liability of the insurers." But the employment of this expression, originating in real-property law, in the construction of a contract of insurance, seems open to criticism. As Lord Ellenborough said, in *Want v. Blunt*,<sup>2</sup> "The analogy does not hold, and the rules applicable to conditions with respect to land do not apply. This is a contract of assurance, and must be construed according to the meaning of the parties expressed in the policy." The contracts in the cases we are reviewing were not policies from year to year, but policies for life, the premiums of which were payable annually. Mr. Justice Bradley said, in delivering the opinion of the court, "The contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium; but it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character."

He then proceeds to explain, that the equal annual premiums for life insurance are not based upon the mere cost of insurance from year to year, which constantly varies, increasing with advancing age; but that each instalment is a part of the consideration of the entire insurance for life. "There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance." The entire opinion of Mr. Justice Bradley shows a familiarity with the subject of life insurance to be expected from one who was distin-

<sup>1</sup> *Howell v. Knickerbocker Life Insurance Company*, S. J. C. of Mass., May 1, 1871.

<sup>2</sup> 12 East, 187.

guished before his appointment to the bench as a mathematician and actuary, — a familiarity the want of which is often deplored when equally eminent judges, destitute of any practical acquaintance with the subject, are called upon to decide difficult questions in the law of life insurance.

Whatever different modes of expression were adopted, there is no indication that any of the judges denied or doubted, that, as a general rule, the failure to pay life-insurance premiums as they mature puts an absolute end to life-insurance policies, when the terms of the policies stipulate that such shall be the effect of non-payment.

Mr. Justice Clifford said, however, "Where the parties to an executory money contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war, and revives when peace ensues; and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract;" and in this Mr. Justice Hunt concurred.

This statement is in striking contrast to the former language of the same judge quoted at the beginning of this article. In giving the judgment of the court in the earlier case, he declared, that executory contracts between persons who become public enemies to each other by the fact that they live in different countries, between which war arises, *are dissolved*. In the latter, he asserted that executory *money* contracts between such parties *are merely suspended* during the war, and revive when peace ensues. For the enlightenment of common minds, we think the learned judge ought to have expanded his dissenting opinion beyond the length of a single sentence, and have shown by explanation and illustration what, in his view, are the executory contracts which are dissolved, and what the executory money contracts which are merely suspended, in such cases, by the declaration of war. If he meant debts by the phrase "executory money contracts," it has never been doubted that the right of a public enemy to collect his debt in the courts of the government at war with the country of his domicile is suspended during the war, and revives with the restoration of peace. Debts may be collected under such circumstances exactly as rights to property situated within the hostile territory may be asserted when the state of hostilities

ceases. This perfectly well-settled principle had been applied by the court in *Semmes v. Hartford Insurance Company*,<sup>1</sup> in the case of a loss by fire arising shortly before the Rebellion commenced. And the court then held, not only that the general statutes of limitation were suspended during the Rebellion, but that the occurrence of war wholly nullified a provision of the policy that no action should be maintained upon it unless commenced within twelve months after the loss. We wonder whether the learned judge could have given a single illustration of a contract to which the doctrine of suspension during war and revival after peace ought to be applied where the engagement was to pay money for a future consideration, the performance of which was made illegal by war, and where the precise time of performance was essential, either by the nature of the contract or the express agreement of the parties. So far as we recall the authorities, that which has been held to be suspended and revived has usually been, not the contract itself, but only the remedy or right of action upon it.

We cannot conceive of any distinction in principle between the case of a contract to pay a sum of money in consideration of services to be performed at a fixed time, and another contract by which the same payment is to be made in consideration of previous pecuniary instalments, payable at fixed periods, and not afterwards. To our mind, it is incomprehensible that any one should hold that a contract of partnership is dissolved by war, and that a contract of life insurance is merely suspended; so that when peace returns the assured has the option to pay up the premiums in arrear, and be restored thereby to the same position as if they had been paid punctually according to the terms of the policy.

Mr. Justice Bradley calls attention to the ruinous consequences that would necessarily follow from applying the doctrines of Mr. Justice Clifford to the practical business of life insurance. However long war might last, the insurance company would be deprived of the contributions which produce the fund out of which losses are to be paid; and, upon the restoration of peace, every policy-holder conscious of seriously impaired health would be sure to claim to be reinstated, while every sound life could be insured at cheaper rates under a new contract, and would therefore elect to abandon the old one. The application of the doctrine of suspension and revival to a unilateral contract, like that

<sup>1</sup> 18 Wall. 158.

of life insurance, would lead to consequences which would be absurd, if they were not alarming.

Mr. Justice Bradley thus deals with the assumption which supposes "the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts; but have they ever been known to take place in the case of executory contracts, when time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure to the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war, five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented earlier performance? The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive."

The rule enunciated in the last sentence ought, we think, to commend itself to universal acceptance.

Before passing to the next topic, it should be observed, that, in these cases, General Garfield, one of the counsel, insisted that it never did become impossible or illegal for a Southern policy-holder to pay his premiums to a Northern life-insurance company, except by his own volition: because the inhabitants of the South were citizens of the United States, bound by a paramount allegiance to the Federal government; and they nearly all had an actual opportunity, if they chose to adhere to the Union, to abandon the territory over which the insurrection prevailed, and to come within the Union lines. There is some plausibility in the position, that those who voluntarily adhered to the Rebellion and remained with the enemies of the national government could gain no rights, and ought to be relieved from no forfeitures, by so doing. But the answer to this view is, that, when it was determined that the Rebellion was a geographical public war, it became wise, just, and legal to carry out this determination to its full

extent, and to treat the inhabitants of the rebel States, in regard to their property and contracts, in all respects as alien enemies, subject to no less and no greater disabilities.

Seven of the nine judges of the court having agreed, though upon different grounds, that the policies had been terminated by the war, another question arose, which Mr. Justice Bradley put to counsel at the argument, in these words: "What is the reason, if there is any, why the insured, where the policy has been terminated without the fault of either party, should not have the *equitable value* of the policy — a term well known amongst insurers — at the instant of the breaking out of the war."

The Chief Justice, in his dissenting opinion, says, that he agrees with the majority of the court, that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war; but that he does not think that a default, even under such circumstances, raises an implied promise by the company to pay the assured what his policy was equitably worth at the time.

Mr. Justice Strong, also dissenting, says, "The majority of the court hold that the assured, in each case, is entitled to recover the surrender, or what they call the equitable, value of the policy. This is incomprehensible to me. I think it has never before been decided, that the surrender value of the policy can be recovered by an assured, unless there has been an agreement between the parties for a surrender; and certainly it has not before been decided that a supervening state of war makes a contract between private parties or raises an implication of one."

The learned judges who thus expressed themselves seem to have been misled by using the phrase "implied contract," and to have confined their minds too much to the ideas associated with that phrase. Why should the past accumulations of a life-insurance policy, which are in the nature of a trust-fund reserved to meet a future liability, when that policy is terminated by war, be regarded any differently from the past profits of a partnership dissolved by the same event?

Before considering the rule of law on this point, as especially applicable to contracts of life insurance, one or two observations suggest themselves upon the general principle governing such cases. If a man has expressly contracted to do an act which it proves to be impossible to perform, he nevertheless is liable in

damages upon his contract. But the non-performance of a contract is always excused where performance becomes illegal after the contract is made. In that event, the contract is repealed or dissolved by the act of the law. If, under such circumstances, the party who is forbidden by law to perform, and exonerated from the consequences of not performing, his contract, has received payment in advance, is it not a plain case of failure of consideration, and of a duty and obligation, thereupon arising, to restore the money to him who has advanced it and received no equivalent? <sup>1</sup> The true distinction is between cases where the contract remains in force, and its performance merely has become impossible, — in which liability to damages remains, — and cases where the contract itself is terminated without the fault of either party. In the latter instance, there will be no future liability for non-performance; and, if a consideration has been received in advance, it is money which, *ex æquo et bono*, belongs to him by whom it has been paid. It may be said, that the parties ought to have foreseen and provided for such a contingency. But this objection would apply to every instance where money is demanded on the ground of failure of consideration. In all such cases, recovery is had, not under the contract, but upon general principles of justice and equity. For this reason, *assumpsit* for money had and received requires no privity of contract, and is called an equitable action. By a useful legal fiction, the law conclusively infers a promise, from the fact that one man has another's money, which he has no right conscientiously to retain. Logically, this form of action belongs under the head of *quasi* contracts rather than of implied contracts, though the latter expression is almost universally employed by common-law writers.

An express stipulation, that the party who receives payment in advance shall restore it, if the contract is dissolved, because the law subsequently renders its performance illegal, is no more requisite than one that the contract shall be dissolved by such an event. The law supplies both rules, — that which dissolves the contract, and that which requires the restoration of the unearned consideration. The injustice of allowing one who has received money without consideration to retain it, is too obvious to need to be insisted upon. Nor can any reason be assigned why the case of a contract becoming illegal, and being dissolved by war,

<sup>1</sup> *Jones v. Judd*, 4 Comst. 412; *Dermott v. Jones*, 2 Wall. 1.

should differ from any other case of a subsequent event rendering the performance of a contract illegal. The conclusion, therefore, is, that money received without consideration (where the failure of consideration is caused by the dissolution of a contract in consequence of war) becomes a debt, the right to recover which is suspended during the war, and revives with peace.

The application of these principles to life-insurance policies requires only an explanation of their nature. Every annual premium upon an insurance for a whole life or an endowment life insurance is made up of a sum charged to cover the risk of death within the year, of a sum charged for the expenses of the company, and of a further sum to be accumulated upon interest to meet the payment of the policy when it matures, if an endowment; or when the possibility of life ceases, by the assumptions of the tables on which the insurance is based. Year by year, as the number of premiums paid increases, there is a larger fund accumulating in the hands of the company, devoted to the ultimate payment of the policy. This sum, which Mr. Elizur Wright calls "self-insurance," which the Massachusetts non-forfeiture law of 1861 terms "the net value" of the policy, which is also called the "net reserve," and by Mr. Justice Bradley the "equitable value" of the policy,—is obviously a provision for the future, and has not been earned by the company, if the insurances terminated before any loss occurs. If the assured voluntarily retires from the company, and abandons his policy, he forfeits this reserve. But, even in that case, the law of Massachusetts grants him a partial equivalent for it in further term insurance. All respectable companies will allow a member who wishes to terminate his policy some compensation for this fund, either in the way of paid-up insurance or of cash surrender value. To allow the member who retires voluntarily to withdraw the entire reserve belonging to his policy would be unjust to the continuing members, and unsafe to the company; because policies on impaired lives almost never are surrendered. And such a course would lead to a selection of risks against the company which would endanger its solvency by destroying the law of average, upon which all insurance is based.

To guard against this result, a surrender charge is always deducted from the net value of the policy of the retiring member, which varies in different companies and under different circumstances. The Massachusetts non-forfeiture law (Stat. 1861,



c. 186) deducts from the net value of a policy forfeited for non-payment of premium all indebtedness to the company, and treats four-fifths of the remainder as a net single premium of temporary insurance, continuing the policy in force for so long a period as that premium suffices to insure such a life. In case of loss, all the forborne premiums are deducted from the amount of the policy.

Mr. Elizur Wright, one of the most distinguished American actuaries, who was the author of this statute, has, for several years, been dissatisfied with its provisions, and has contended, with much acuteness and ingenuity, that there ought to be in all life-insurance contracts a fixed surrender value, either expressly stipulated for or required by law to be paid, which every policy-holder who elects to abandon his insurance may at any time demand and receive. But it is not perceived that any of the opinions in the cases under consideration in the least intimate that a policy-holder who voluntarily retires from a life-insurance company has any legal or equitable right to a surrender value, except such as may be stipulated for by the express terms of the policy or conferred by the statute law under which the contract was made.

The court determined that the equitable value or net reserve upon a policy of life insurance terminated by the act of the law without the fault or volition of either the assured or the underwriter, is in the nature of unearned premium, — money received for a future consideration that has failed, — which in justice belongs to the policy-holder, so that he may recover it back at law or in equity. There seems to have been no occasion to resort to equity in any of these cases; and if the objection had been seasonably taken, that the remedy at law was plain, adequate, and complete, and equally convenient and efficacious with any obtainable in equity, it would probably have prevailed.

The date as of which the equitable value of the policy should be computed was suggested by Mr. Justice Bradley, at the argument, to be "the instant of the breaking out of the war." But, in his opinion, he says, that "the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forfeited."

Perhaps the question, which of these dates is correct, may deserve further consideration by the court hereafter.

If the later date be the right one, there must have been a period during which a valid contract of insurance subsisted upon the life of a public enemy; and if a loss had occurred during that period, it would have become a debt, the remedy to recover which was merely suspended during hostilities, and revived upon the restoration of peace. To such a doctrine Lord Ellenborough's remarks seem applicable: "It differs only in degree whether an enemy be indemnified during a war for the losses he sustains in consequence of it, or whether he receive compensation for the same losses after the termination of the war; in both cases, the loss will, at one time or another, fall on the country of which the insurer is a subject; and the enemy will, during the war, receive either *means or encouragement* from his losses being, in the one case, compensated as they shall happen, and, in the other, from his prospect of indemnity at last."<sup>1</sup>

If, however, a contract to insure the life of a public enemy is unlawful, and such a policy previously made is dissolved by war, the inception of the war obviously must be the date as of which to determine the equitable value of the policy. Interest upon the equitable value is to be allowed, as the court hold, from the close of the war.

The method of ascertaining the equitable value was probably referred to by Mr. Justice Bradley in the way of illustration merely, and it seems unlikely that the court intended to state the rule for its ascertainment with entire precision and accuracy. Mr. Elizur Wright has called attention to the fact, that the rule given in the opinion "does not seem to eliminate that part of the premium which is a provision for the expense of transacting the business." The net value of any life policy is the remainder, after deducting from the premiums paid the cost of insurance up to the date of the calculation, and also the margin charged for expenses, usually called loading.

If the method suggested in the opinion be adopted to ascertain the net value of a policy, the comparison ought to be made between annuities based not upon *gross* premiums at the respective dates of the commencement and termination of the risk, but upon annuities based on the net premiums at those dates. However, this entire topic belongs to the domain of mathematics rather than of law; and the appropriate time for its consideration will be

<sup>1</sup> *Gamba v. Mesurier*, 4 East, 407.

after the several suits have been fully tried or heard upon their respective facts.

The general conclusions of the court in these cases seem to be just, right, and wise, and a felicitous application of well-settled legal principles to a novel state of facts. The court has done that, the ability to accomplish which is one of the chief merits of the common law, which is founded, Chief Justice Shaw says, "upon a comparatively few, broad, general principles of justice, fitness, and expediency, the correctness of which is generally acknowledged; which original principles remain fixed, but are comprehensive enough to adapt themselves to new institutions, new modes of commerce, new usages and practices, as the progress of society and the advancement of civilization may require."<sup>1</sup> Complaints are occasionally made that the Supreme Court of the United States disregard technical rules too much; but it would be lamentable if this august tribunal were to administer a system of national jurisprudence upon principles less enlightened and comprehensive.

DWIGHT FOSTER.

<sup>1</sup> *Commonwealth v. Temple*, 14 Gray, 69.

## THE "MOLLY MAGUIRE" TRIALS.

THE coal-mines of Pennsylvania are probably indispensable to the prosperity of the country. But, without malice or prejudice, it may be safely declared that the elimination of a large proportion of the people inhabiting those regions might be borne by their fellow-countrymen with equanimity. The chief business of the employers of labor there is to enter into nefarious conspiracies for the purpose of fastening an extortionate tax for their own benefit upon the industry and enterprise of the country at large; the chief business of the employed is to engage in "strikes," and to commit crime. The people of the United States, who are mulcted and victimized by each class in turn, have little reason to love either, and might have watched the internecine strife waged of late years between the two with a certain grim philosophy and impartiality of feeling, had it not assumed so bloody and revolting an aspect upon the part of the laborers. But the utterly brutal manner in which these wretches have sought to get the better of the tyrant caste has created a sympathy for the latter. A combination to exact unjust prices, pursuing the forms of law, is certainly much more in accordance with the spirit of the age than an association having for its chief object burning, beating, and assassination. In 1875 these anthracite districts had become one vast Alsatia. From their dark and mysterious recesses there came forth to the outside world an appalling series of tales of murder, of arson, and of every description of violent crime. It seemed that no respectable man could be safe there, for it was from the respectable classes that the victims were by preference selected; nor could any one tell from day to day whether he might not be marked for sure and sudden destruction. Only the members of one calling could feel any certainty as to their fate. These were the superintendents and "bosses" in the collieries; who could all rest assured that their days would not be long in the land. Everywhere and at all times they were attacked, beaten, and shot down, by day and by night; month after month and year after year, on the public highways and in their own homes, in solitary places and in the neighborhood of crowds, these doomed men continued to fall in frightful succession beneath the hands of assassins.

The condition of things was like that which has occurred so often, at irregular intervals, in the melancholy history of Ireland. The shootings and the burnings of the Whiteboys and of the Ribbonmen were reproduced with terrible energy and success upon this side of the Atlantic; and for a time it seemed that the disease was more incurable in its American, than it had been in its Irish, development. For the strong repressive force of an active and powerful dominant caste, and of military surveillance, were wanting in Pennsylvania. On the contrary, as will be seen, the perpetrators of the outrages in this country were a political power as well as a social terror, and seemed not unlikely to obtain control of all that machinery and organization of justice which alone could be relied upon to control them. Otherwise, the parallel was complete. Amid the numerous class to which the criminals belonged, they were sure not only of shelter and protection, but of honor and distinction, in proportion to the heinousness of their villany. A system of signals aided their escape upon the few occasions when escape was thought to be worth while; a host of ready perjurers stood ready to prove an *alibi* in the improbable event of a capture and trial; while amid multitudes who were cognizant of various stages and circumstances of the guilty act, it was not often that a single one could be discovered to bear witness for the government. By a natural progression the state of affairs grew rapidly worse, until the whole district appeared to be upon the verge of a riotous outbreak, which would readily have become the chronic and normal condition of the neighborhood.

The sober and peace-loving members of the community within and around the tormented region gazed with ominous forebodings at the spectacle before them, and scarcely ventured to speculate when or how the end would be, when suddenly they were gladdened by a series of arrests, and by the rumor that for many months a detective had been secretly and successfully circulating through the social layer wherein the mischief dwelt. Respectable men began to breathe more freely; and with good reason, for their rescuer had now reached the last stage of his work. It was to the admirable perseverance and enterprise of Hon. Franklin B. Gowen, President of the Philadelphia and Reading Coal and Iron Company, and to the vigor, courage, and skill of the man employed by him, that this distinguished achievement was attributable. The

debt which the coal counties owe to these men cannot be over-estimated, nor can the personal qualities of untiring resolution, daring, and sagacity, in both principal and agent, be too highly praised. Together they accomplished one of the greatest works for public good that has been achieved in this country and in this generation.

The story, as it was developed at the trial of the case of the *Commonwealth v. Kehoe and Others*, is now to be narrated. Eleven defendants were named in the indictment, of whom two escaped, and nine were taken and brought to trial. They were charged with an aggravated assault and battery, with intent to kill, committed upon William M. Thomas. The trial was had in the Court of Quarter Sessions for Schuylkill County, Pennsylvania. But since the interest of the tale does not centre in the question of the guilt or innocence of these especial defendants, whose criminality indeed no one ever doubted from the outset, but in setting forth a sketch of the whole subject-matter, there will be occasionally included extracts from the trial of Thomas Munley for the murder of Thomas Sanger, a mining "boss," which trial took place in the same county a few months earlier.

Both of these crimes were as simple as they were barbarous ; for there was no skill, ingenuity, or refinement about the deeds of these ignorant miners. William M. Thomas was standing in a stable one morning, when four men appeared at the door and fired at him rapidly with pistols. They left him for dead ; but he was only severely wounded, and recovered to bear testimony against some of them. The case of Sanger was more affecting. He was a mining "boss," a young Englishman. As he went out to his work, early in the day, five men confronted him and began firing at him ; he turned to escape to the shelter of the house close by, but was intercepted ; he stumbled and fell. The murderers came up, still firing into him, and one of them coolly turned him over upon his back, so as to take a more sure aim at a vital spot. Startled by the reports, his employer, a Mr. Robert Heaton, ran out towards him ; but the bleeding man cried out, "Never mind me, give it to them, Bob !" His wife also rushed from his house and stooped over him. "Kiss me, Sarah, for I am dying," said he ; and these were, indeed, his last words. Mr. Heaton gallantly obeyed the request of his slaughtered servant, and pursued the retreating murderers, firing at them, whilst they occasionally faced

about. He thought that some of his bullets took effect, though none of the men fell ; but if this was doubtful, he was at least able to secure vengeance in another way, for he came upon the stand in this trial to identify Munley as one of the gang ; and his evidence was all-important.

It was in the summer of 1873 that application was made to Major Allan Pinkerton, the head of the National Detective Agency at Chicago, to detail a fit man for the perilous task of tracking the criminals in the disturbed counties. The selection fell upon one James McParlan, an Irishman by birth, about thirty years of age, who had come to this country in the spring of 1867. He appears to have been born and bred in the middle, or what may be more accurately described as the lower-middle, class, and had led a somewhat roving life. His experience as a detective had not been long. He had been in the employ of one Baubien for nearly two years, from 1866 to 1868, and had served Major Pinkerton only since the spring of 1872. It is said that he was subjected to a series of severe and somewhat odd tests of his capacity before he was actually put at work in this business ; that, with a view to making sure of his accuracy and powers of observation, he was sent to the coal regions, and directed to report daily upon all kinds of meaningless matters, — the number of men passing over a certain bridge within a certain time, the number of miners frequenting a certain saloon on a certain day, and how many drinks they took, and a great variety of similar apparently petty details. He acquitted himself with remarkable success upon this "trial trip," and the bargain securing his services was accordingly struck. He was to receive his expenses, and, in addition, the fixed salary of twelve dollars per week, so long as he should be engaged in this duty ; he was to be entitled to no increase or reward in the event of a success however brilliant, to suffer no deduction in case of a total failure ; he was to make daily reports in writing to his superior officer, covering every matter, however minute, which should come within his knowledge during the day. The advantage of this rule was abundantly proved in the opportunity which it subsequently afforded him to secure his memory against the pit-falls of cross-examination.

It was well known that the crimes which it was designed to ferret out were conceived and executed by the members of a numerous and powerful association, commonly called by the famil-

iar and dreaded sobriquet of Molly Maguires. The name and the organization were nothing new, both having come down by direct descent from the Ribbonmen of Ireland. When those breakers of the peace started out upon any of their forays against the Saxon landlord or his agent, they were accustomed to dress themselves as women; hence the Celtic feminine appellation. The association had been brought to this country by immigrants, and had flourished amid the race which brought it. The foreign connection was still cherished, and the true head of the whole fraternity was the Board of Erin in Ireland. From this source emanated the secret signs and passwords of the brethren, and "toasts," which were called "goods," and were sent over from Ireland and distributed to the members every three months. A national delegate and a president lived in New York, beneath whom there were distinct branches in the several States. In Pennsylvania, the body had even acquired a charter, under the title of the Ancient Order of Hibernians. This instrument declared the purposes for which the order was established to be "to promote friendship, unity, and true Christian charity among its members; and, generally, to do all and singular the matters and things which shall be lawful to the well-being and good management of the affairs of said association." The preamble to the constitution and by-laws, adopting the same language, declared that this promotion of friendship, &c., was to be sought "by raising or supporting a stock or fund of money for maintaining the aged, sick, blind, and infirm members, and for no other purpose whatsoever." A couple of stanzas of pious doggerel followed:—

"These laws, though human,  
Spring from love divine;  
Love laid the scheme,—  
Love guides the whole design.

"Vile is the man  
Who will evade these laws,  
Or taste the sweets  
Without sufficient cause."

It was further recited, that "the Supreme Being has implanted in our natures tender sympathies and most humane feeling towards our fellow-creatures in distress; and all the happiness that human nature is capable of enjoying must flow and terminate in



the love of God and our fellow-creatures." The articles then proceeded to establish an elaborate mechanism of officers, and to lay down and enforce by fines some excellent rules of conduct. For coming to a meeting in a state of intoxication, the penalty was one dollar; and in the possible contingency that a member should "swear an oath" in the Division-room, he must be "fined the sum of fifty cents for each offence." No person was eligible to membership unless he should be Irish, or of Irish descent, a Roman Catholic himself, and born of Roman Catholic parents, and "of good moral character."

But, in justice to Catholicism, with which these criminals have been very improperly and unjustly associated in the minds of some persons, it should be said that no such unholy connection exists. Mr. Gowen's statement on this point was explicit and forcible, and, though made in argument, may be inserted here by anticipation: "I desire to say to you," said he, that these men "have been denounced by their church and excommunicated by their prelates; and that I have the direct personal authority of Archbishop Wood himself to say that he denounces them all, and that he was fully cognizant of and approved of the means I took to bring them to justice. And, for myself, I can say that for many months before any other man in this world, except those connected with the detective agency, knew what was being done, Archbishop Wood was the only confidant I had, and fully knew of the mission of McParlan in this whole matter. So much, then, for the assumption of Mr. L'Velle, that these men claim sympathy on account of their being Catholics."

The Association mustered strong at the polls, and played an audacious part in the distribution of public offices. Many a position of trust was filled by a Molly Maguire, elected by the suffrages of his abominable associates. Members of the order were county commissioners, high constables, chiefs of police. In this very county of Schuylkill one of them, occupying the position of county commissioner, was building an addition to the jail; another had been candidate for a judgeship of the same court before which Munley was tried, and narrowly failed of election. Verily the jeopardy was extreme: with Molly Maguires to commit murders, with other Molly Maguires set to catch them, others to hold them in confinement, others to draw the juries to try them, others to act as witnesses to prove an *alibi*, and still others to pre-

side at the trial,—a condition of things was nearly consummated which would render it very reckless for any person, not belonging to the criminal Association, to live in that part of the country. Moreover, so soon as it became a political power, the order at once also became respected and courted by politicians; so that ere long the Mollies came to exercise a considerable influence in the State. No wise governor could be expected to make these well-organized wretches his enemies; and so it came to pass that in the rare and unusual event of a Molly actually being pursued successfully through all the protections which the Association threw around him, and being convicted and sentenced, he still had a last, and by no means a forlorn, hope in the gubernatorial power of pardon. Shameful and incredible as it may seem, it is nevertheless unquestionable, that again and again had this power been exerted to release men whose only claim to the favor was the fact that they were prominent in an organized association of criminals.

McParlan, having come into the disturbed region under the assumed name of James McKenna, travelled up and down there for a short time, making himself acquainted with the topography and people, and especially with the members of this charitable body. In due time, having gathered a sufficient knowledge, he caused himself to be proposed for membership; and, in the face of the pure and virtuous articles of the constitution, he ventured to suggest the singular credentials, that he had lately killed a man in Buffalo, for which laudable achievement he was now a fugitive from the hangman; homicide, however, was only incidental with him, he confessed, for his favorite occupation was to "shove the queer." As an occasional murderer and a professional counterfeiter he not only secured a warm and ready welcome to this loving fraternity, but was deemed worthy of more especial trust and honor. Official distinction was conferred upon him, in the shape of the secretaryship of a Division; and, when he had happily attained this position, he found himself admitted to the inmost councils of the local organization, and able to learn all their secrets and designs.

In the latter part of May McParlan met John Kehoe, who combined with the private office of county delegate of the Mollies the public function of high constable of a great borough. With this prominent personage McParlan had some talk, in the course

of which Kehoe remarked that things were in a bad way at Mahanoy City; that the Modocs were raising the mischief there; that he had a mind to call the Molly Maguires together, take them down to Mahanoy and have them challenge the Modocs to come out to fight. If the Modocs would not come, then the Mol-lies might shoot them down at sight in the streets in the daytime. But reflection showing that there were objections to this plan, Kehoe finally abandoned it, and determined to call a meeting for consultation. This was convened on June 1; several of Kehoe's co-defendants, with McParlan, all save one being office-holders in the Association, were present. There was not much formality observed; but an executive capacity was manifested, which might set an example to more respectable gatherings. Kehoe simply stated that the Modocs had tried to shoot Dan Dougherty, and commit other outrages. Dougherty, a Molly, who had lately been arrested on a charge of shooting George Major, was sent for. He readily appeared, showed some bullet-holes in his coat, said he believed that Jesse Major had shot at him, and "allowed," that, if the Majors and "Bully Bill" were put out of the way, he would have peace. He then withdrew; and the conclave proceeded to arrange for putting the Majors and Bully Bill out of the way, with the charitable and fraternal purpose of securing peace for Dan Dougherty. Two of those present, Donahue and Donnelly, agreed to attend to the Majors. Kehoe then stated that it devolved on McParlan, O'Brien, and Roarity to take charge of William M. Thomas, *alias* Bully Bill. Kehoe, who seems to have been a very dashing fellow, advised walking openly up to the victim upon the street in the broad daylight, and there and then shooting him down. But those who had to perpetrate the deed inclining to be somewhat more chary of exposure, it was determined to bring up some men from another neighborhood, not so well known in Mahanoy City, to do the deed. This was finally agreed to, as being in accordance with the customary tactics of the Association, which was wont to have its crimes committed by men unknown in the immediate vicinity, and consequently less liable to be recognized.

A meeting of the Shenandoah branch was therefore promptly gathered in order to select the murderers for Bully Bill. McParlan, as secretary, issued the summons. In the arrangements which ensued he found that he was expected to assume the lead-

ing part in the commission of the deed. Three other men — Gibbons, Doyle, and Hurley — were detailed to go with him, and they were to set out forthwith. McParlan, however, had no idea of permitting the crime to be actually accomplished on this occasion, and when the four came to Mahanoy, he suggested that it would be unsafe to carry out the plan just at that time, because of the untoward presence of several soldiers who were patrolling the streets and keeping most vexatious good order. The conspirators, egotistically asserting that the life of any one of them was "worth a hundred such as Thomas's," listened to this warning, and returned home. But the attempt was only postponed, not abandoned; and a few days later, about June 10 to 12, the murderers were again in motion, McParlan, however, making some excuse for not going along with them. The other three, arriving at Mahanoy without him, found quarters there, and patiently awaited their opportunity, the detective all the while keeping constantly informed as to their movements.

It was not until June 28 that circumstances favored the murderers. McParlan at the time was ill at Shenandoah; and, though well aware that the crime was about to be consummated, he declared that it was impossible for him to report the fact to the members of the police and detective force with whom he was accustomed to be in frequent, generally in daily, communication. The only reasons given for his abstention from any effort to save Thomas were his illness, and the danger or even impossibility of trying to communicate with his confederates, by reason of the keen lookout maintained by the Mollies at this juncture. He was bitterly assailed for this reticence by the counsel for the defendants, who represented him to the jury as having deliberately given over the victim to the slaughter. But the sufficiency of his excuse must be believed, since the forewarning which he was to furnish to his superiors of any scheme for the commission of an act of violence was an essential part of the plan which had been contrived for the detection of the crime and the capture of the criminals.

He had stipulated at the outset that he should not be called as a witness in any trial which might result from his discoveries, that his agency should not be in any way brought to light, nor his true character ever be disclosed; otherwise, his life could never again be safe, and his future usefulness as a detective would

be seriously impaired. The preservation of his incognito was of the first importance to him. Since, therefore, no use could be made of his testimony, it was necessary to procure testimony from some other quarter, or the mere accurate foreknowledge of the designs for committing any number of successive specific crimes would be of no avail for breaking up the guilty combination. It had accordingly been planned that McParlan should give such information as would lead to the capture of the conspirators in the very commission and act of crime, and if it should so chance that he should be with them, he also was to be captured. As an especially dangerous character, he was to be taken charge of by the leader of the capturing force, and was then to be collusively permitted to make his escape. So punctiliously was this agreement with him carried out, and so cautiously was his secret guarded, that it was only known to certain chosen members even of the detective force. The subalterns thought him to be a genuine Molly, and of a dangerous stamp, and often so reported him at headquarters. Many a time, as he testified, when some villany had been concocting, had he given information, and many a night had Captain Linden and his assistants "lain out" on the watch. But circumstances had as often disappointed them, and no capture had yet been made. His mission was far from being safe or agreeable; he was living with the lowest and poorest classes, as one of themselves; a breath of suspicion would insure his destruction; he had been long at work, and his employers might soon grow discontented. Certainly there is no reason to suppose that he was not acting in perfect good faith, and that he would not have been heartily glad to have had the long-awaited success achieved, without further risk, delay, and anxiety. When, therefore, he says that to give notice was impossible, he must be believed.

But whether with or without the detective's fault, certain it is that no friendly band was on the watch to preserve the life of Bully Bill, when, on the morning of the twenty-eighth day of June, the four assassins came prowling around his quarters, intent upon his destruction. It was about half-past six o'clock, and Thomas was standing in a stable, talking to the "stable-boss," very near to the door, and having his back to it, when the men appeared at the door, and began pouring in upon him a rapid fire from their pistols. The first shot struck him in the

neck, and as he turned and jumped towards his assailants, he came to such close quarters that he actually seized the muzzle of one of the revolvers which was pointed at him. He was hit four times; a horse was killed, and another horse wounded. Thomas fell with one of the brutes, and sheltered himself behind the body. The assailants, knowing that their victim was hit, and seeing him go down, covered with blood, were confident that he was killed, and withdrew, highly gratified with the successful issue of their venture. It was by a very narrow difference that the actual result fell short of that which they had anticipated. One of the bullets passed within less than a quarter of an inch of Thomas's jugular vein. But the slender space was sufficient to save the man's life, and he appeared at the trial to identify one of the assailants.

The assassins, hurrying homeward, came "wet with sweat" into Shenandoah, where they met McParlan, and told him how they had shot Bully Bill. One of them — a marked man, and in fear by reason of other charges — thought it best to abscond. In virtue of this, by no means his first good service to the Society, he not unreasonably considered himself to have established a claim for money upon his fellow-members. But it must be acknowledged that the recognition of his deserts was somewhat niggardly on the part of an Association which was wont to pay pecuniary rewards for a good "clean job" of killing. Kehoe would only give him a dollar and fifty cents, which seemed "very mean;" he got two dollars, however, from another man, borrowed a horse and wagon to go to the railway station, and there took the cars for Wilkesbarre. Three dollars and a half and the loan of a vehicle certainly does seem a cheap price for a murder, and almost awakens sympathy for the man so ill paid. But the truth was, that the affair had proved a fiasco for all concerned; Thomas alone having any reason to congratulate himself upon the result. Kehoe was much disgusted that an intended murder had degenerated into nothing worse than a serious and not fatal wounding. McParlan and his principals seemed to have lost the chance to catch their game in such a way as to have testimony against them; and, in the end, the perpetrators had to suffer, without having enjoyed the satisfaction of success. Apparently McParlan's task was as far as ever from being accomplished. Yet the knowledge which he had been able to convey was not

altogether useless, since it led to some arrests, though not quite in the shape desired. The purpose was to detect the criminals, one or more, under such circumstances that the whole character and working of the Association could be shown up, its secrets betrayed, and a definite stigma set upon it. The capture and even the conviction of individuals at whose trial there could be shown nothing more than the commission of an ordinary act of violence, were altogether insufficient. Still, when such captures could be made, they were not neglected; and it so happened that in February, 1876, two men had been seized upon suspicion, and there was to be a hearing upon their application for the writ of *habeas corpus*.

It was just about this time that, in some unexplained way, rumors began to circulate to the effect that "McKenna," as he was called, was a detective. The alarming news of this suspicion was brought to McParlan by a comrade, also a member of the Association, who said that bets had been laid that McKenna would appear as a witness against the prisoners. During the next few days the suspected man had a fine opportunity to show of what stuff he was made. Among the wretches who now began to regard him as their betrayer, there was probably not one who would hesitate an instant to take his life. If there was glory and bounty for an ordinary murder, what substantial profit and high distinction would be reaped by him who should succeed in immolating the most dangerous and treacherous enemy whom the Order had ever had! The bravest man could have no nerve to spare in such an emergency!

McParlan was not wanting in self-possession and courage, and many a man has sent his name down to a remote posterity by incurring a much less trying risk of self-sacrifice. In company with several members of the Order, he at once returned to Shenandoah, to his old quarters, and, on the following day, went straight to Kehoe, who had been very busy in warning the Mollys against him, demanded a trial by the Society, and challenged his accusers to produce their proofs. Kehoe agreed to his request for summoning a county convention, and even asked McParlan to write the calls to the several Division masters, being himself too nervous to do so. McParlan, who was not at all troubled with nervousness, accordingly penned the despatches announcing his own trial upon so grave an accusation.

Intimations and threats now came rapidly to his ears. He was told, very significantly, that the brethren thought that they must "take action upon him." He coolly replied that he had already arranged to take action upon himself; that he insisted upon a trial, and proposed to make his traducers suffer handsomely. Up to and upon the day previous to that fixed for his trial he was still mingling intimately with these men, eating and drinking with them, and sleeping in their houses. Suddenly, at this eleventh hour, he heard that there was a story afloat to the purport that his trial was only a pretext, artfully arranged by himself, for the purpose of getting together in conclave all the chief men, and then bringing the Coal and Iron Police upon them, and capturing them all in the hall. Captain Linden now thought that the jeopardy was getting entirely too imminent, and expostulated with McParlan upon remaining longer in the neighborhood; but McParlan insisted that he would go on, and that no police should be allowed to show themselves. "I believe," said he, with his stubborn self-reliance, that "I can fight them right through, and make them believe that I am no detective."

But Captain Linden was right, and McParlan soon found out that he was not likely to be tried the next day, for the excellent and sufficient reason that he was not likely to be alive at that time. Many symptoms which his observant and experienced eye noted upon every side showed that he was a marked man, and that his fate was close at hand. In the dark evening he felt obliged to make one of his companions walk in front of him along the street, alleging as a reason that "his eyes were bad and he could not see." His eyes were good enough, however, to note that sentinels were posted; that signs and passwords were exchanged; and that some of the men were very nervous and became peculiarly agitated when addressed by him. A thousand symptoms showed that the Mollies were excited, and were on the eve of an enterprise which they deemed of even more than usual importance and danger. The next morning a couple of Mollies came in, one drunk and the other feigning drunk, and, in reply to a question, gave an obviously false account of themselves. McParlan went out and got a horse and sleigh to go to see Kehoe. His friend, who had first warned him of the suspicions against him, got in with him. The two other Mollies got into another sleigh, and drove along behind them.



"Look here," said this friend, "you had better look out, for that man who is riding in that sleigh behind you calculates to take your life." This pleasing intelligence was further supplemented by the explanation of a plan laid by Kehoe for the assassination of McParlan the night before. The murderers had been ready with their weapons at the appointed spot upon the road. But McParlan had been too shrewd to take his usual route, and so had escaped. To all this McParlan's only reply was, "I do not give a cent; I am going down to Kehoe's;" and straight on to Kehoe's he went. Quite a crowd was assembled there, and they were much taken aback by McParlan's daring appearance among them. It was soon whispered to him that some of them were for killing him, then and there, without more ado; that one man was trying to borrow a revolver to shoot him down at once. But the man was drunk, and "not a good hand at that kind of business," so that the cool McParlan was not much disturbed. For some reason or another the trial failed to come off, the triers being probably too much discomposed by anxiety and alarm. McParlan got into his sleigh to go home again; but on his way back with the friend who had so often warned him, and who had repeatedly promised to stand by him in this matter, he was persuaded, though much against his will, not to return to his own boarding-house, but to sleep with his friend. Had he not allowed himself to be thus persuaded, he would doubtless have dared his fate too far, for there were men after him that night at his own house, and he could hardly have escaped had he gone there.

McParlan now began to feel that the end of the game was approaching. He saw Captain Linden, and told that gentleman that the Mollies "had had a peep at his hand, and that the cards were all played." Yet he agreed to go amongst them once more, the Captain undertaking to "keep a close shadow" upon him. Not much came of this last expedition, however, beyond giving McParlan a further opportunity to exhibit his keenness of observation, his coolness, and courage. There was nothing more which it was possible for him to do; and the next morning he left the neighborhood for good.

This premature conclusion of the detective scheme, unlooked for as it had been and unwelcome as it at first appeared, was in reality the most fortunate event possible. Practically, the mask

was torn off. There was now not a Molly who did not fully believe in McParlan's real character, — who would not be ready to shoot him at sight. To preserve an incognito longer was futile, — nay, the safest thing for himself was doubtless to have the Association thoroughly shattered, and the direst possible terror stricken into the hearts of the members. His immunity from vengeance depended upon their panic and utter demoralization. By his testimony alone could this end be secured. The agreement that he should never be called as a witness being no longer of value for his protection, was cancelled by his consent, and he went voluntarily upon the stand, and gave substantially the facts thus far narrated. Thus it was that a full and perfect exposure of the whole guilty organization was at last accomplished.

Such, at least, would appear to be the true history, as the same is to be gathered from the report of proceedings at the trial of Kehoe. But there is a story told somewhat different from this, and not quite consistent with it, for the accuracy of which we cannot vouch. This is to the effect that McParlan so far regained the shaken confidence of the Mollies as to be again consulted by them as a friendly counsellor in their troubles. He is even reported to have advised the prisoners as to whom they should retain to defend them, and as to the best points which they could make in their defence. By his superior intelligence he had gained great influence with them, so much so that they deemed him capable of astonishing achievements in their behalf. So strong was this feeling, that, when he was called to the stand by the prosecuting attorney, as the first witness for the government, the dense crowd of Mollies who packed the court-room smiled and chuckled with obvious triumph, for they thought that "McKenna" had gallantly come to the rescue, and would, in some astute and daring way, destroy all chance of the District-Attorney securing a verdict. But when, in reply to the usual question as to his name, he replied, "James McParlan," the unfamiliar sound brought instant conviction of the truth to his auditors. A deep and universal groan ascended from the disheartened mass, who now recognized that the fate of the prisoners was sealed beyond doubt or hope.

Beyond what has been narrated the prosecutors adduced little matter of novelty or interest. Bully Bill undertook to identify one of the prisoners, Gibbons, as the man who shot him in the neck.

Francis McHugh, a defendant, corroborated the testimony of McParlan as to most of the proceedings taken at the meeting at which it was determined that Bully Bill and the Majors "should be put out of the road." The witness very frankly acknowledged that to give his testimony seemed to him to be the best defence he could make; that he expected less punishment than he should otherwise have suffered; and that, in his opinion, it would have been better for the interest of his comrades in the dock if they had all pleaded guilty.

The warden of the Schuylkill County jail had a few significant and interesting words to say. During another trial of some Mollies for the murder of the policeman Yost, the warden had had a chat with Kehoe in his cell, in the course of which the prisoner had remarked, "I think it will go rough with us too. I do not think that we will get justice;" but he cheerfully added, "let them crack their whips. If we don't get justice, I don't think the old man at Harrisburg will go back on us." The counsel for the defendants strongly objected to the admission of this testimony, on the ground that it could not bear upon the question of the guilt or innocence of the accused. The government counsel insisted that, so far as Kehoe was concerned, who, of course, alone could be affected by it, the language was equivalent to an admission of guilt. It was evidence showing that he knew himself to be guilty, and believed that he could not be acquitted. The judge declined for the present to strike out the testimony, promising to both counsel an opportunity to be heard before the question should be finally decided. What was the ultimate ruling of the court does not clearly appear from the printed report of the trial.

McParlan's evidence was corroborated in sundry particulars by various witnesses besides McHugh, but chiefly in small points of detail. Upon substantially the foregoing facts the prosecutors rested their case.

The opening for the prisoners failed to disclose any other grounds of defence than a general onslaught upon the government witnesses, and especially upon McParlan. The counsel gallantly declared that he should show that this main pillar of the government case was a very broken reed indeed; that McParlan had contradicted himself continually; that he was an instigator of crime; an accomplice with the accused men; and altogether an

uncommonly bad and odious villain. But no affirmative evidence of innocence was promised on behalf of any one of the arraigned band. Even this programme, dangerously weak and unsatisfactory as it appeared, was very imperfectly fulfilled. The impression conveyed by the printed report of McParlan's testimony is eminently favorable to his clearness and accuracy. He seems to have stood the test of a severe and searching examination with a degree of straightforward readiness, really quite remarkable in view of the minuteness of the interrogation. The points of contradiction can hardly be set forth in detail; but as each one of them by itself was insignificant, so we should place upon the entire collection precisely the same valuation which was placed upon it by the jury, — to wit, no value at all.

A great number of witnesses were called to prove the good character of the accused; but so singular was the testimony adduced by these persons, that the prisoners might well have prayed to be preserved from their friends. Probably a more ignorant gang never passed in ludicrous procession through a witness-box. Very few of them were capable, even after elaborate instruction, of deriving an idea from the word "reputation." "I never saw much out of the way," said the first one, speaking to the character of Kehoe. "What did the *people say* about him for peace and good order in the community where he resided?" asks the counsel, encouragingly. "Well, I cannot exactly tell you," replies this foggy-minded auxiliary; "I do not know much about the affair; I believe people talked about him having been so and so, but then I never knowed any thing myself." Under the less friendly hands of the government counsel the man admitted that he had seen Kehoe engaged in scuffles, and "tight," and that he (Kehoe) kept the headquarters for the Molly Maguires. Witness number two had never heard people talk much about Kehoe, but had heard some say he was a good citizen, and others say that he was a Molly. Witness number three had heard nothing against him except that he was a Molly. Witness number four said that he knew nothing about Kehoe, and that, outside of his own ignorance, he must admit that Kehoe's reputation was bad. Witness number five said that Kehoe kept good order, so far as he had seen, but was "blamed for a Molly." Witness number six testified dubiously: "As far as good order is concerned, that is all right; so far as good order is concerned, I do not know any

thing against him ; as far as reputation goes, that is rather bad." No amount of manipulation could bring this unfortunate Hibernian up to the mark ; he still persisted in repeating : " As to his conduct, that has always been good, but as far as the reputation goes, I never did hear much good." Witness number seven impartially acknowledged that " some will say good, and some will say bad." Number eight had heard hard things said against Kehoe for being a Molly, but he himself didn't know much against the Mollies. Number nine did a little better, saying that Kehoe's reputation was " pretty good," and that he had never heard that Kehoe was a Molly. Such were some of the cheerful fragments of the evidence which was intended to sustain the good character of John Kehoe. If his own counsel could listen to it with equanimity, the prosecutors were certainly not tempted to be very keen in raising questions as to admissibility or competency.

Fortunately for the other prisoners, they had either better names or more clear-headed friends, and they fared not quite so ill. The worst that was said of them was that they were reputed to be Mollies. One witness paid a tribute to the defendant Canning, as being " a gentleman in all respects." But on cross-examination this same high-minded witness acknowledged that he " could not say what *people say*, because there are hundreds of stories, some of them good and some of them bad ; I do not think I would do justice to him or justice to myself if I paid attention to them."

Only poor Gibbons could not get very good words in his behalf. The first witness called knew that Gibbons was a Molly, and had never heard people say any thing about his character for peace and good order ; had never seen him do any thing but drink. The next witness declined to bear any testimony, wisely remarking, that, " You see people is talking so much, I cannot take notice of all the people say." Another witness had never heard any thing worse of Gibbons than that " he was wild when he would be drinking ;" and was corroborated by the next in order, who acknowledged that when Gibbons " had liquor in him he was a little wild." The next, and last, knew nothing against this defendant, " only that he belonged to the Mollies."

The defence, having sought with such imperfect success to bolster up the character of the accused, next turned their atten-

tion to an effort to destroy the character of the intended victim and government witness, Thomas. The possessor of the pleasing *alias* of Bully Bill does not appear to have been an extremely valuable member of the community; and if a fatal result of his wound had made it possible to have all these defendants hanged instead of only imprisoned, society could, probably, have spared "Bully Bill" in so excellent a cause. Yet the counsel for the prisoners appear to have been no better adepts in destroying than in building up a reputation. They were unlucky in this sort of undertaking, and, considering what an excellent subject they had to deal with in Thomas, it must be confessed that they made a bad failure. One of their witnesses relieved himself from the inconvenience of cross-examination by swearing very bluntly, on the direct, that Thomas's reputation for truth and veracity was good, to the best of the witness's knowledge.

The testimony upon both sides being closed, Mr. Gowen addressed the jury on behalf of the government. His speech in this case, as also in that of Munley, was very bold, ingenious, and able. He managed with much skill to get fairly before the minds of the jurors all the long series of murders and crimes which for so many years had placed in daily peril the lives of the law-abiding and decent citizens in the anthracite counties. Upon this panel he laid the weighty responsibility of saying whether this condition of things should cease now, or should continue and grow worse in the future. The Association itself was on trial; the prisoners were its prominent leaders, its officials, its energetic and trusted members in this neighborhood. The crime with which they stood charged had been committed by them in their character and capacity as office-holders in the Ancient Order of Hibernians. The organization of the Molly Maguires had been fully explained in the progress of this cause; the characteristic actions of the Association had been brought to light; its purposes and dealings had been exposed. It was now a question, to be determined by the verdict, whether or not that Association should have a longer life. The prisoners were relegated to positions of inferior interest; the Society was brought forward as the real culprit. The fate of Kehoe and Gibbons and their comrades was mere matter of detail; the true issue was, whether or not Molly Maguireism should be sustained or crushed. It was an organized body of criminals that was practically to be

condemned or acquitted ; it was mere matter of form that the finding would actually run only for or against the few individuals named in the indictment.

The allusion contained in the warden's testimony was boldly used ; and from this fact, by the way, it would appear that this evidence was not finally thrown out. Judging from the past, as Mr. Gowen charged, the courage of Kehoe to share in this crime must be attributed in no small part to " his confident belief that, no matter what crime he had committed, no matter how he might be detected, no matter how he might be convicted, . . . there was a power beyond us all, in this State, that would give him a pardon, and permit him to walk out of your jail, as so many members of his infernal organization have walked out before, with pardons in their pockets, which by them were considered not only pardon for the past, but immunity for any future crime which they might commit."

In the trial of Munley he spoke not less openly and forcibly. Having referred to the number of public offices filled by members of the blood-stained fraternity, " God knows," he said, " that when the time comes that all I know may be told to the world, it will reveal a history such as will make every American citizen hang his head with shame. . . . I have seen this organization wield a political power in the State which has controlled the elections of a great Commonwealth. I have received the information of meetings between some of the highest officers of the State and the chief of the murderers, at which large sums of money were paid to secure the votes of this infernal Association, to turn the tide of a State election. God knows if ever in the world there was a revelation as deep and as damning as that now laid open to the people of this Commonwealth for the first time!" Verily, after making liberal allowance for rhetorical exaggeration, it may be admitted that a change of administration, which should cause the " old man at Harrisburg " to make room for a successor of somewhat different affiliations, would seem not wholly undesirable for the good people of Pennsylvania.

Mr. Gowen had played the chief part in this whole scheme of detection ; he had devised, and had been mainly instrumental in working, the elaborate and effective machinery which was designed and expected to destroy Molly Maguireism. His anticipations had had no narrow limit, according to the sketch which

he now ventured to give of them. He had hoped to see his trusty detective, "Jim McKenna," rise to the high post of county delegate in the Association, and he would not have been sorry even to see him arrested, tried, and convicted for some minor offence ; to have seen him suffer a short imprisonment, and come forth all the more admired and trusted by the Mollies. Could McKenna have had but another year to work up this business, "you would have had the pleasure, I believe," said Mr. Gowen, "of hanging some men who are not citizens of Schuylkill County. We would have got at the head of this Order in Pittsburg, and we would have got at its head in New York ; we would have got to its source in England, Ireland, and Scotland, and, I believe, established the affiliation of the head of the Society with these murderers and with the killing of their victims, and showed how they helped criminals to escape. These defendants are mean and common criminals beside those whom it would have been my greatest pleasure to have prosecuted before you." The counsel was warm in the cause which he was pleading, and threw himself into it with a personal ardor and enthusiasm. "We were informed and knew months ago that these men were the perpetrators of the crime with which they are now charged ; and from the time I first had any information about any of them, the life of that man became as sacred in my eyes as the life of any man whom they threatened. And why ? From that time, in my own heart and in my own mind, I solemnly dedicated these men to justice. Their lives became safe, so far as any influence I could exert, until the time came for their trial ; and when some of the offenders in this society were arrested, a few months ago, and when we heard rumors and reports of vigilance committees intending to take the lives of these men into their own hands, for the purpose of doing that which justice had not been able to do for them, I trembled for their lives with as much solicitude as I did for the lives of any upon this earth !"

It is not often that counsel have been known, at least in this country, to take such a tone as this in arguing a criminal cause before jurors. Mr. Gowen was severely taken to task for it afterward, in the speech for the prisoners. Yet, it is not easy to find fault with him. He had entered upon a difficult, a perilous, a momentous task, fraught with the gravest results to the public welfare. As it was now approaching its consummation, and suc-



cess or failure was imminent, in speaking the last words which he would be able to utter to affect the result, surely it was pardonable for him to connect himself with the cause in this peculiar manner, and to give vent to his deep and earnest personal feeling. His language seems fully justified by the sentiment which stimulated it. "I felt," said he, "that I and those associated with me had a high and holy duty to perform. We wanted no vigilance committees; we wanted no reign of anarchy in this county; we wanted the majesty of the law to be enforced and justice to be vindicated in an open and public manner." The ability, the resolution, the perseverance, the courage manifested by this private individual, working without the assistance of government—perhaps in spite of the secret opposition of some influential politicians—in the untiring pursuit of an end so difficult and so noble, should secure for him the admiring recognition of all his fellow-citizens. When, at last, McParlan had done his work and agreed to tell his story, then Mr. Gowen resolved to "take his place among the ranks of the counsel for the Commonwealth," and to labor with the District-Attorney "in the prosecution of these offences until the last one was wiped from off the calendar of the criminal courts. And let it take weeks," said he, "or let it take months, or let it take years, I have buckled on my harness and entered for the fight, and, God willing, I shall bear it out as bravely and as well as I can, until justice is vindicated, and the county of Schuylkill is free." He had run no small personal risk in this matter, and once, in the Munley case, he referred to it. "Is there a man in this audience," he said, "looking at me now, and hearing me denounce this Association, who longs to point his pistol at me? I tell him that he has as good a chance here as he will ever have again. I tell him that it is just as safe to-day to murder in the temple of justice as it is in the secret ravines of the mountains or within the silent shadows of the woods. I tell him that human life is safe!" Bold words and a gallant defiance. Yet, few men, probably, would care to occupy the position which Mr. Gowen has occupied for years past, and must occupy even for years to come. It cannot be conducive to perfect ease of mind to know that hundreds of utterly reckless villains are thirsting for one's blood!

The defendants' counsel could hardly have been expected to

listen with entire equanimity to a speech into which there had been smuggled with such vexatious ingenuity a great amount of extraneous and very objectionable matter. At its close, they preferred to the court a request that the jury be discharged from further consideration of the case, for the reason that the learned gentleman representing the Commonwealth had "travelled outside of the evidence in this case, charging these men with crimes, to wit, the highest crime known to the law, without a scintilla of evidence in this case; charging them with the crime of murder, unproven, untestified to." The prosecution deigned to utter but a few words concerning the propriety of the argument, and simply suggested, upon the point of law, that the authorities showed that the "exception must be made at the time the remark is uttered, and that it is too late after the counsel has taken his seat;" also, that the exception could only be taken to the last address to the jury, and not to the opening argument, to which there was opportunity for reply. The court, without hesitation, overruled the motion.

Mr. L'Velle then made the first address in behalf of the accused,—an address so objectionable, both in matter and in manner, as quite to cast into the shade any possible fault which could have been found with Mr. Gowen's much more cleverly managed argument. Yet, in mitigation of the offensiveness of this harangue, it is right to remember to what sorry straits the unfortunate orator was reduced. A lawyer may fairly claim no small measure of sympathy and forbearance when he is expected to make an eloquent defence of men palpably most villanous, and in whose behalf not an affirmative word or fact of any real value has been elicited from the beginning of the proceedings. Mr. L'Velle gallantly took the bull by the horns at once. In stating to the jury that his clients were entitled to the benefit of any possible doubt as to their guilt, he actually ventured to say that "the maxim of the law clothes them with innocence as pure as doves,—yea, as white as snow,—until that doubt is dispelled in your minds." In truth, it was a bold stroke of rhetoric, verging dangerously upon the extreme of irony, to compare these ignorant and bloodthirsty wretches to doves and snow. With what countenances the intelligent jurors received the happy suggestion the record does not disclose. But the sentence struck the key-note of the whole address, which is mildly described by

saying that it was in bad taste from beginning to end. Unfortunately, too, behind this absurdity there was graver matter; and the counsel, probably not without hopes of touching the prejudices of some members of the panel, next sought to give to the condition of affairs in Schuylkill County the aspect of a resistance not unrighteously made by the laboring classes against the aggressions of wealth and capital.

Professional rules allow an ample latitude to advocates engaged in defending persons accused of serious crimes; but the latitude must be almost unlimited, if it can include and shelter such a merciless onslaught as was made upon the devoted James McParlan in this case. The defence had not brought a particle of testimony against his character, unless their futile efforts to show him to have contradicted himself in substantial matters can be considered such. Unless the whole system of employing detectives is to be condemned, it would be difficult to condemn his conduct as developed in these proceedings. It was fair enough to make the point against him that he was technically an accomplice, so that his evidence must require corroboration; and upon this the defence dwelt with much force and elaboration. It was not a point which troubled the prosecution much, or which the judge found any difficulty in dealing with in his charge. Neither would it be possible to find fault with the suggestion to the jury that McParlan might have had more at heart the enhancement of his own reputation as a detective than the real furtherance of the ends of justice. It is not to be supposed that he was altogether disappointed to find that he was not following a false scent, and that there was abundance of criminality to be shown up by his vigor and sagacity. It was true that he had not prevented the crimes of which he had foreknowledge; but this was a painful necessity of his duty, and to have prevented the act would have been to destroy the very ends of his mission. The assault upon him for neglecting to prevent was undoubtedly open to the defence, and could undoubtedly do the prisoners no good and McParlan no harm in the minds either of the jurors or of any other person whomsoever.

But the defence went much further than this, and, altogether unjustifiably, as we cannot but think, made an assault upon this man as the plotter and instigator of crime. If we have studied the testimony aright, there was not a particle of evidence to

show that he had ever devised, or originated, or done more than to appear to take his allotted part, in any unlawful act. But Mr. L'Velle had represented that all had been peace, and lovely virtue, and the sweetest innocence, until this man came into Schuylkill County. He was then declared to have arrived as the "emissary of death," and since his advent crime had been in the ascendant. The last part of the statement was certainly true enough; but the epithet which introduced it ought never to have been used. He was represented as a "wretch" and "wily miscreant," who had seduced the tender Hibernian youths from the paths of righteousness; and the jurors were requested to "tell the community, tell the wealth that dominates every thing in this county, — yea, I regret to say it, and justice too, — that upon the testimony of such a man as this detective, no citizen of this county should be condemned or convicted. Tell the gentlemen who represent the wealth of this county to see that justice shall be done to these men." When Mr. L'Velle had exhausted all that he had to say concerning the apparent connection of poor McParlan with this "carnival of crime, of blood, of misdeeds, and transgressions of the law, innumerable, black, and atrocious," the senior counsel, Mr. Ryon, followed in the same vein, proposing to show to the jurors "that of all the devils who have been in this county, plotting against the peace and good order, this man, McParlan, was the worst. That is not all; for he came here well supplied with money, and, with a shrewdness scarcely equalled, he has plotted all this deviltry and carried it out to a most successful issue, because he succeeded in killing every man against whom his plans were formed. Wren and Sanger, James and Yost, are to be numbered among his victims."

Mr. L'Velle appears to be a gentleman of lively and florid imagination, and his attractive sketch of the poetic tranquillity of Schuylkill County was possibly not much more correct than his comparison of his clients to tender doves. Answering a similar argument in the case of Munley, made, we believe, by the same advocate as counsel for the defendant, Mr. Gowen detailed a tolerable list of "casualties."

"Does the gentleman forget Dunne, who was murdered within two miles of this town? Does he forget Alexander Rae, who was stricken down near Mount Carmel? Does he forget the assassination of William Littlehales? If he does, I am very sure

that his colleague, Mr. Bartholomew, will not forget it; for I remember that I stood here, just where I now stand, some years ago, defending a couple of men on trial for murder, who, with other good citizens, when the house of a 'boss' had been attacked at Tuscarora, by a mob intent upon murder, . . . had sprung to arms, and had taken their old muskets, their rusty rifles, their pistols, and their swords (some of them with no time to load their muskets, save with the marbles with which their children had been playing), and had sprung to arms to defend the house that was attacked, and had shot down one of the assailants in his tracks; and were arrested and brought here, charged with the crime of murder. My friend, Mr. Bartholomew, who was my colleague, joined with me in contending that our clients had done that which they ought to have done to protect themselves; and as I was standing here, arguing that case, there came over from Coal Castle the news that William Littlehales had been murdered. Does the gentleman forget all this? Does he forget George K. Smith and David Muir? Does he forget the assassins who made the attack upon Claude White? Does he forget Morgan Powell and Langdon, who were killed, and Ferguson, who was almost beaten to death? Does he forget Patrick Barry, who, living with his wife and children in the house by the tunnel, when a band of assassins attacked him at night, placed his wife and little children in the middle of the house, and piled all the mattresses and blankets and pillows around them, and, when he had sheltered them as best he could, fought an angry horde of two or three hundred men, keeping them at bay until daylight, when they fled, leaving the long tracks of their blood behind them to show how well he had avenged himself upon his assailants? . . . Nor is it alone those whose names I have mentioned, — not alone the prominent, the upright, and the good citizen, — whose remains have been interred with pious care in the tomb of his fathers; but it is the hundreds of unknown victims whose bones now lie mouldering over the face of this county. In hidden places, and by silent paths, in the dark ravines of the mountains, and in the secret ledges of the rocks, who shall say how many bodies of the victims of this Order now await the final trump of God?"

Mr. Ryon took the ground that it was the duty of McParlan to do one of two things: either to disclose the projected crime

to the Commonwealth officials, and have the plotters arrested before the commission of the deed, or else to have used his own influence to stay the consummation. On the contrary, by permitting the crime to proceed, and not, in the earlier stages, shunning to play his own allotted part in the transaction, McParlan was charged with having become more than a detective, — he had rendered himself an accomplice and a *particeps criminis*, equally liable with his fellows. It was not a bad point that was made by Mr. Ryon, that, whereas the only method by which the government professed to have expected to use McParlan was by getting information from him and catching the criminals in the very act, yet, in this matter, the information had not been given; and, though there were fifty policemen in the neighborhood, who might have been on hand to save Thomas's life, and to capture the would-be murderers on the obvious verge of perpetration, nevertheless, the business was allowed to proceed uninterrupted. McParlan's illness was stigmatized as a flimsy, trifling reason; and the risk which he professed to have feared to run ought not to have counted for any thing to a man of his spirit and courage.

Reputation was very plastic beneath the manipulation of the counsel for the defence. Not content with suggesting the dove-like and snowy purity of their clients, and the incredible and bloody villany of McParlan, they even had words of favor to bestow upon the Ancient Order of Hibernians, chartered for the propagation of Christian charity and brotherhood. But they had a better opportunity and fairer game in William M. Thomas; and if it could constitute a good defence in law, to show that the taking off of the murderer's victim would be a blessing to the community amid which he dwelt, these accused men might have expected an acquittal. It was the familiar argument of the poor girl who pleaded that her illegitimate child was such a very little one! Unfortunately, however, for the prisoners, the public benefit which they had intended to consummate by relieving Schuylkill County of the undesirable society of Bully Bill, could not form a ground for a verdict of not guilty. The only practical advantage to be gained by traducing Bully Bill's character was to affect injuriously his credibility as a witness. Nor is it improbable that most respectable citizens would have been quite content had the bullet in the neck diverged by that small

fraction of an inch which would have sent these defendants to the gallows instead of to prison,—always supposing that the "old man at Harrisburg" should not interfere.

Mr. Kaercher, district-attorney, closed the case in a temperate, but clear and forcible, speech. The charge of Judge Walker was given on Aug. 12, the fourth day of the trial. The jury retired, but were out only twenty minutes, returning then with a verdict of guilty against each of the prisoners, and with a recommendation to mercy in the case of Frank McHugh. A similar satisfactory result was arrived at in the case of Munley, and one, at least, of the murderers of Thomas Sanger was, on July 12, 1876, convicted of murder in the first degree. Up to the time of this writing, the "old man at Harrisburg" is not known to have extended the saving grace of his clemency to any of these defendants.

JOHN T. MORSE, JR.

## SOME RULES OF EVIDENCE.

## DISCREDITING ONE'S OWN WITNESS.

THOUGH much has been done in the last quarter of a century to bring the law of evidence into greater conformity with the requirements of common sense, we are amongst those who think there is room for still further improvement. The retrospect during that period sweeps over a waste of abandoned absurdities, which, in their day, — and they had a long one, — were practised and defended with might and main, not merely by the average lawyer, but by those whose names have been handed down to us as the sages from whose wisdom we of the present day are to derive inspiration. It is almost inconceivable to us that the men most cultivated and most renowned for wisdom of their day and generation, in a community claiming, and perhaps justly claiming, to represent the highest and best civilization of their times, could have not only acquiesced in, but defended, the rule that excluded all interested persons from the witness-stand; and that, too, upon the ground that it was more likely that such persons would speak falsehood than truth. We wonder if, and are unwilling to believe that, the state of society in England was for centuries, and down to the time of the present generation, or ever, of a character to warrant such a rule for such a reason. Yet the present generation has witnessed the abrogation of the rule, not only in England, but, we believe, everywhere else; and we suppose that there is not now a man living who would venture to speak a good word for the dead and buried absurdity. Jeremy Bentham, to be sure, had the courage, in the early part of this century, to assail it, together with a multitude of other, kindred and not kindred, absurdities. He brought to bear upon it the batteries of his logic, ridicule, and invective; and, in his rough style, bore down with merciless severity both upon the rule itself and those who defended or tolerated it. Sydney Smith, we remember, lent him the aid of his wit, through the pages of the *Edinburgh Review*. But, with this exception, we cannot recall the name of any considerable person who ventured to



applaud, or even approve, the eccentric philosopher. On the other hand, the legal world looked upon his strictures with indifference, if not with contempt, as the idle speculations of a cynical and visionary interloper into the domain of a science of the principles of which he knew next to nothing. The Ellenboroughs and Bests, indeed, returned scoffing for scoffing, and sneered at their assailant as "a learned writer, who has devoted too much time to the theory of jurisprudence to know much of the practical consequences of the doctrines he has promulgated to the world."<sup>1</sup> Time, however, has done for Bentham what it usually does for those who promulgate truths not in harmony with the established and venerable errors and prejudices of the generation in which they live. "The truth is," says Taylor, the latest of British writers on evidence, "that, when Mr. Bentham's work on evidence first made its appearance, the world in general regarded the author as a gentleman who delighted in paradox, and wrote bad English; while, in the judgment of even the discerning few, this great apostle of judicial reform ranked little higher than an ingenious theorist. But truth, though long discountenanced, will at length prevail; and thus, by little and little, Mr. Bentham's opinions were at first canvassed, then recognized as correct, and finally, in a great measure, adopted by the legislature."<sup>2</sup> We will venture to add, that he must be well informed, both in the rules of evidence and the history and reasons thereof, who would not find great advantage in the careful study of the writings upon this topic of that eccentric philosopher. Even his extravagances are entertaining; and the alertness and acumen with which they are set forth are a perpetual intellectual relish. Whether one knows, or does not know, how to argue, let him read the "Rationale of Judicial Evidence."

But these are by-gones, from which we are now happily emancipated; and we ought, perhaps, to beg pardon for indulging in even so little of retrospect pending the year of jubilee.

Let us now, for a moment, look at the law as it is, upon the right of a party to discredit his own witness. He may discredit him indirectly, by proving a fact relevant to the issue to be the contrary of that which the witness may have sworn it to be;

<sup>1</sup> Best, C. J., in *Bovill v. Stephenson*, 5 Bing. 493, cited, apparently with approval, by Greenleaf, Ev., vol. i. sect. 485, n.

<sup>2</sup> Taylor's Ev., vol. ii. sect. 1212.

the purpose not being to discredit the witness, but to prove the fact in issue: and it is obvious enough, though, strange as it may seem, this point was seriously contested, that the mouths of all a party's witnesses ought not to be shut because one is unable or unwilling to speak the truth. No argument is necessary to show that this rule, now so firmly established that no one thinks of gainsaying it, yields the whole principle. It is no answer to say that the purpose and intention is not to discredit. It does discredit. If the party proves the fact about which his witness has misstated or been mistaken, by a sufficient weight of evidence to control the case upon any particular fact, the witness is discredited. His testimony, in that particular, is practically laid out of the case. And whether he be thought to have misstated from carelessness, inaccurate recollection, imperfect knowledge, or wilful disregard of the truth, he stands discredited as to all other facts to which he may testify; for the same carelessness, inaccurate recollection, imperfect knowledge, or wilful disregard of the truth, may have led him into misstatement in regard to these. Every lawyer knows how dangerous it is to be obliged to rest his case, on any point, upon the unsupported testimony of such a witness.

But, although you may discredit your own witness thus indirectly, it is said you shall not do it directly. The law upon this point is more fully stated by Professor Greenleaf,<sup>1</sup> than we find it elsewhere. And it is thus:—

“When a party offers a witness in proof of his cause, he thereby, in general, represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces; and, having thus presented them to the court, *the law will not permit the party afterwards to impeach their general reputation* for truth, or to impugn their credibility by general evidence tending to show them to be unworthy of belief. For this would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him.”

The authorities cited seem to justify this statement of the rule, though we do not find in them the reasons given by the author, except the last one, which is taken almost *verbatim* from Buller's *Nisi Prius*. The other reasons are, however, familiar to the

<sup>1</sup> Vol. i. sect. 442.

profession, and are doubtless taken from the books. But are these reasons sound, or sufficiently substantial to warrant such a rule? Is a party presumed to know the character of his witnesses? Who presumes it? And upon what evidence is such a presumption based? A presumption of a fact arises from its known connection, according to common experience, with a proved or given fact. Falsehood gives rise to the presumption of guilt touching the subject-matter about which the falsehood is perpetrated; because, according to common experience, men do not lie unless they have done something which they are conscious they ought not to have done, and which they therefore desire to conceal. There is a known connection between the falsehood and the guilt. Every one, intuitively, suspects a liar of some delinquency. But does common experience show that, from the given fact that a witness is brought into court by a party, it is to be inferred that he not only knows his character, but also that that character is such that, "in general," he is worthy of belief? A man is found dead in a brothel. The circumstances are such as to lead to the belief that he was murdered. An indictment is found against the supposed murderer. The government finds that the inmates of the house are cognizant of the facts. They are uncommunicative. They equivocate. They even contradict each other. But the prosecuting officer is, upon the whole, satisfied that the truth may be arrived at by a careful examination and comparison of their several statements with each other. He accordingly issues his summons, and brings into court, not such witnesses as he would like to have, but such as accident, or chance, or the providence of God, has put in his way, — a half a dozen prostitutes, with the keeper of the brothel, and one or more pimps. He has no choice. His duty, and the necessities of his case, alike require that he should produce them, and all of them. Does he present them to the court, as, in general, worthy of belief? He knows — what oftentimes parties do not know — the character of his witnesses, and that, if it is not bad for truth and veracity, it is bad for every thing else. He is morally certain that, if they do not positively lie, they will not tell the whole truth; but, nevertheless, he sees his way to the truth through the haze of indirection and immorality. It would be too much for the gravity of any court to listen to an opening by the prosecuting officer on the general belief-worthiness of such a bevy of

caitiffs; and a sensible and fair-minded jury would listen with impatience to such inopportunity. The chances are that they would see in such a course a lack of candor, and a want of appreciation of the gravity of the situation, which would throw over the whole case of the government, in advance, a suspicion which would be fatal to its success. But the course which a sensible prosecuting officer would pursue, we apprehend, would be quite different. Before he had been on his feet many minutes, he would find opportunity to observe that neither government nor individuals have any means of determining who shall or shall not be witnesses. Witnesses are not made to order; at least, not by honest people. The only witnesses who can properly be called are those who happen to have knowledge of relevant facts; and who these may be is predetermined by the history and course of the events which are to come under examination. He would be most happy to introduce to their attention the evidence of witnesses of the greatest intelligence and the highest character, if it were in his power; but as he had no hand in determining the place where, or the circumstances under which, the murder was committed, nor of determining who should be present on the occasion, he would be obliged to content himself with introducing the evidence of such witnesses as, from the history and circumstances of the cause, he had reason to suppose might aid them in coming to a decision upon the issue which they were about to try. And the imagination of man may conceive that he would further suggest, with great pertinence, that, looking to the time, place, and circumstances, they would hardly expect him to produce saints and angels as the eye-witnesses of such an event, inasmuch as, according to the ordinary course of events, such sort of people and beings do not frequent such sort of places. He would not undertake to say that the witnesses he would be obliged to introduce were entirely trustworthy in all respects, or, in general, worthy of belief; but as they were the only ones who could be had, because the only ones who knew whereof they were about to affirm, it was his duty to ask a careful consideration of their several stories, in the hope that they would find enough in them that was reliable to indicate the path which justice ought to pursue. Otherwise, there must be not only a failure of justice, but, what is of hardly less moment, a failure to attempt to do justice. Now this is no

fancy sketch. Nine-tenths of the witnesses as to facts constituting the essential elements of crime, whom the government is obliged to bring forward, or else forego the attempt to protect society by the punishment of the vicious, are rogues, in a greater or less degree, of whom no candid man could, and no prudent man would, affirm that they are in general worthy of belief. Thieves are daily brought from behind the prison-bars to testify against the receiver who bought of them their stolen goods. Who else knows, or would be likely to know, the time, place, and circumstances, of the transaction? Indeed, not seldom the government has to choose between the alternative of suffering a whole gang of villains to go unwhipped of justice, or of taking one of the gang itself to use as a witness against the others.

So far, therefore, as the administration of the criminal law is concerned, it is obvious that this reason is not well founded. But how is it in civil matters? How many cases are brought into court where the previous course of events does not determine, not merely who may be, but who must be, the witnesses of the respective parties? A party is obliged, it is said, to call the subscribing witness to a written instrument; and, therefore, the witness may be contradicted as to the fact to which he is called to testify. But suppose suit is brought by an administrator upon an instrument having no subscribing witness, but executed and delivered in the presence of a third person, and the defendant denies the delivery, is not the plaintiff obliged to call this third person as a witness? He has no choice but to call him, or lose his case. Take the common case of an assault. The plaintiff is knocked down in the street, in the presence of two or three persons, who are standing upon the sidewalk, witnesses of the whole affair. They are strangers to him, of whom he knows nothing, save that they saw and knew what transpired. He sues his assailant, and calls the by-standers as witnesses. He presumes, and rightfully presumes, that they will testify truthfully to what they saw; and he calls them, not from choice, but from necessity.

And so it is in the great majority of civil cases, whether in contract or tort. The witnesses to the material facts in dispute are such persons as happen to have been cognizant of the facts, and not such as the parties have selected at their pleasure. In

point of fact, it is substantially true that parties call particular persons as witnesses simply because they are obliged to, and can call no others. If a lawsuit was a manufacture, and the party bringing it could select his materials, — facts and witnesses, — there might be some propriety in holding him responsible for the character of these materials; but, as both are beyond his control, his responsibility for their character is out of the question. He comes into the court with the best materials he can get to make out his case.

But, then, it is said that it would be unfair if a party who introduces a witness, and asks that credit be given him, when he knows and has the means of proving him to be untrustworthy, could be allowed to turn round and discredit him if he testifies against him. This rule, by the way, applies as well to the party who does not know, as to him who does know, the character of his witness. But what is there unfair in the latter case? He deceives no one, unless, upon the theory which has just been shown to be unsound, that he represents his witness in general to be worthy of belief. The court is not imposed upon because a witness is introduced whose veracity is impeachable; nor is the defendant, who may be presumed to know, because he is interested to know, what manner of man this witness against him may be, and trusted to see to it, that, unless he betrays the plaintiff, he shall be impeached. The plaintiff knows, that, if the witness will speak the truth, it will help his case, and aid the cause of justice; and, although he knows him to be treacherous, yet, upon the whole, he thinks it will be safe to trust him. He sees no reason why he should not have the benefit of the truth which the witness promises to tell. He has a right to the truth; and he does not see, neither can we, why he should be punished if he fails to get it. He is not speculating in unlawful chances, but is honestly striving to get what he is entitled to. It is not his fault that the witness is unsafe, though it may be his misfortune. But where is the wisdom or fairness of aggravating that misfortune by giving to a defendant, who stood ready to impeach the witness if he did tell the truth, the fruits of the betrayal? Courts are not established to give that party his case who behaves best in court. If they were, it seems to us that the plaintiff stands quite as well in such a case, on the score of fairness, as the defendant, who lies in wait for the profits of treachery. But courts are not always so dis-

tressed upon this point of fairness. There is a popular impression, not confined by any means to rogues, that it is not exactly fair for the government to single out one of several confederates in a common criminal act, and give him immunity on condition that he will betray his fellows. Nothing is more common than for courts and prosecuting officers to explain, in an apologetic way, that this is necessary to secure the ends of justice. And a perfectly valid excuse it is. In point of fact, no wrong is done. A thief, who receives at the hands of the law only his just deserts, may regret, with the great mass of honest people, though from a different motive, that his fellow escapes. But he has no ground of complaint. And government, in such a case, fulfils its duty of protecting the community, to the extent of its ability. It must content itself with shutting up one of two malefactors, if it cannot shut up both. The till-tapper, no doubt, thinks it hardly fair that the detective should persuade him to take from the drawer the marked coin which has been placed there on purpose to entrap him, and then appear on the witness-stand against him. But it is no plea in bar. He is none the less a till-tapper because he has been deceived; and the court will tell him, that, if the evidence is competent, they cannot go into the inquiry how it may have been obtained. A little sharp practice in obtaining evidence, whether in criminal or civil cases, is an outside matter, and in no way pertinent to the issue on trial. The question for the court to decide is, whether the evidence is admissible: not whether the plaintiff's counsel has outgeneralled the defendant's counsel in obtaining it. Even confessions obtained by fraud are admissible. The fact that documents are stolen, or otherwise illegally obtained, does not affect their quality as evidence; and the conduct of the parties, or their counsel in that behalf, does not enter into the merits of the case. "When papers are offered in evidence," said the late Mr. Justice Wilde, in a case where they had been obtained under a search-warrant illegally issued, "the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question."<sup>1</sup> If anybody has been wronged, they must seek their remedy in a proper way; but that documents or writings are evidence, or not evidence, according to the manner in which they may have been produced, is not a doctrine which

<sup>1</sup> *Com. v. Dana*, 2 Met. (Mass.) 827.

the courts recognize. Unfairness, then, does not seem to be a valid ground upon which to refuse the right to discredit one's own witness.

This notion of unfairness seems to be an inference from the language of Mr. Justice Buller. "But a party," says that learned judge,<sup>1</sup> "never shall be permitted to produce general evidence to discredit his own witness; for that would be to enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hands of destroying his credit if he spoke against him." He does not give the reasons stated in *Greenleaf*, or any others. In fact, these seem to be the outcome of subsequent efforts to find what reasons could be given, with an obvious inclination to be satisfied with very indifferent, in default of good, ones. The earliest statement of the practice which we have been able to find is in *Adams v. Arnold*,<sup>2</sup> which was trespass for an assault, and where it is said that "Holt, C. J., would not suffer the plaintiff to discredit a witness of his own calling, he swearing against him." This is the whole case. No reasons are given. Still later, the principle is said to have been adopted in *Warren Hastings's Case*, June 11, 1789, when Thurlow, Lord Chancellor, without giving any reasons, refused to allow the prosecution to show that portions of the contents of a paper which they had introduced were not true, — a ruling at which Burke expressed his contempt with such extraordinary emphasis that we wonder the court did not take notice of it.

The rule thus stated, whatever may have been the reason, is not now law, if it ever was. Already, in the time of Buller, it was limited to a denial only of the right of a party to produce "general evidence" to discredit his own witness; and there has been a constant tendency in the courts and legislatures still further to limit it, so that the witness is now only shielded from a direct attack on his veracity.

We think it time that that protection should also be removed. The reasons heretofore stated upon which this rule is said to be founded seem to us quite insufficient; nor are we aware of any others upon which its defence has been rested. On the other hand, there are the gravest reasons why the rule ought to be abrogated.

<sup>1</sup> *Nisi Prius*, 297.

<sup>2</sup> *Holt*, 299.



In the first place, there is something which closely approaches the absurd in the very proposition, that, in a proceeding which has for its sole purpose the ascertainment of truth, to the end that justice may be administered, an untruthful, or incredible, or unreliable witness, by reason of moral infirmity, may not be unmasked by any party in interest. One would think that the most natural mode of procedure would be to ask, first and foremost, how far a witness may be trusted; and that nothing could be so important in aiding the jury to come to a correct conclusion, as that they should know just how far each witness is to be relied upon. What more absurd than to ask a jury to find the truth upon the testimony of a witness notorious for not speaking the truth, all the while concealing from them the fact that he is, or may be, a false witness? And how can it be of importance to the main purpose of the trial, how or by whom the fact that the witness is not to be relied upon is made known?

In the next place, the rule is a mischievous one. Its enforcement cannot, in any case, so far as we can see, promote justice; and we can plainly see that in many cases it may promote injustice. The chances are very small, that a discreditable witness, if he tells the truth, will not be impeached by the opposite party; and this is as it should be. For, though such a witness may, and often does, tell the truth, it is better that a jury should know that he is not entirely trustworthy, in order that they may scrutinize his statements with the greater care. But if he betrays the party who calls him, and falsifies in every statement which he makes, the opposite party will, of course, accept the treason, say nothing of impeachment, and leave the jury no alternative but to find an unjust verdict, upon evidence which both the parties know to be the rankest perjury. Certainly, a rule which may produce such a result ought to be at once discarded, unless it can be shown to be of some special use in the general purposes of a legal controversy. That a court of justice should permit such a miscarriage on the merits, because it sees, or fancies it sees, a shadow of unfairness in one of the parties, in a matter collateral to the suit, and in no way touching the justice of the case, is a reproach which ought to be done away. Nobody can profit by the rule, but the witness and the antagonist of the party who calls him, and they only by the defeat of the ends of justice.

They may combine and defraud. In truth, the rule is a standing temptation to an unscrupulous party to tamper with his adversary's witness.

What we have here said is based upon the assumption that a party knows, when he offers his witness, that he is impeachable. In many cases, however, — perhaps in the majority, — he offers him in perfect good faith, and without any belief, or reason to believe, that he can be impeached. And, if betrayed, why should he not, by discrediting, or in any other way, be allowed to eliminate, so far as may be, the unexpected and adverse testimony, or, at least, to place it before the jury in its true light? More than all this, upon what reasons of propriety, fairness, or justice, should an untrustworthy witness be imposed upon the jury as a trustworthy one? The wholesome tendency of modern jurisprudence is to admit all relevant evidence, without regard to its quality or the manner in which it may have been obtained, unless there are some objections to it on the ground of public policy.

A comparatively recent case in Massachusetts well illustrates the inconvenience of what we conceive to have been a misapplication of the rules we have been discussing. It was there held, that if a witness testifies, with an obvious purpose to conceal, that he has no knowledge about a certain fact, the party calling him cannot be allowed to ask him if he has not, on a former occasion, sworn to his knowledge of that fact.<sup>1</sup> The reason given is, that the answer to the question does not tend to neutralize the effect of evidence given by the witness against the party calling him; for he had given none, and can only disparage the witness, which is inadmissible. This, however, loses sight of the object for which the question is put; which is, not to neutralize any adverse evidence, but to compel a reluctant or corrupt witness, by the moral forces of the necessity of explaining his inconsistency, to disclose what he does know. A party has a right to compulsory process to bring a witness into court, although the witness declares that he knows nothing of the matter inquired about. And it is contempt of court to refuse to obey the summons for such a reason.<sup>2</sup> So if, being in attendance,

<sup>1</sup> *Com. v. Walsh*, 4 Gray (Mass.), 535. Shaw, C. J.

<sup>2</sup> *Chapman v. Davis*, 3 M. & G. 609.

he refuses to take the stand, it is also a contempt.<sup>1</sup> May he, then, at the very next stage of the proceeding, thwart the whole object for which the courts are clothed with power to summon witnesses and compel them to testify, and deprive the party who summons him of his right to that testimony, by merely saying that he knows nothing of the matter inquired of? Does this conclude the party calling him? The suit, we will suppose, is trover for the conversion of a horse. The plaintiff knew that A. was present when the horse was taken, or sold, by the defendant, and was the very person to whom the defendant sold him. A. is summoned by the plaintiff, put upon the stand, and asked if he knows the defendant. With evident reluctance to testify, and with an evident purpose to conceal, he replies that he does not. Is it not within the fair limits of the rule by which in the discretion of the court a party may be allowed to cross-examine his own witness, not for the purpose of discrediting him, but for the purpose of compelling him to disclose the facts which he is attempting to conceal, that he should be allowed to ask him if he has not said that he did know him, or made some other statement which implies that he did know him? Does not the right to cross-examine, *ex vi termini*, carry with it the right to expose the witness to the obloquy of inconsistency or prevarication, or even to the perils of perjury, if need be, in order to elicit the truth? The discretion of the court is not an arbitrary discretion. It attaches to the question, whether the witness is a willing or an unwilling one, — whether he means to tell the truth or to conceal the truth; and, having decided, preliminarily, that he is unwilling and means to conceal, the right of cross-examination supervenes as a right. To refuse to allow a party who produces such a witness to cross-examine him within the fair limits of a cross-examination, is to deprive him of a right. And that such a question to such a witness is within the fair limits of cross-examination, is the every-day experience of courts. To admit it, is to expose fraud, and, without violating any legitimate right of the witness to protection, to promote justice. To deny it, is to shield fraud, and, perhaps, to expose a just claimant to unmerited and irremediable defeat. To exclude such a question, therefore, it seems to us, is to ignore the long-sanc-

<sup>1</sup> 4 Bl. Com. 284.

tioned methods of cross-examination, and, upon grounds which can hardly be deemed more solid than sentiment, to jeopardize important rights which courts of justice are established to secure. Indeed, we venture to think that such a decision would never have been made, had not the learned Chief Justice's mind been unduly preoccupied with the rule which we have endeavored to show is likely to be useful only in so far as it is allowed to fall into disuse.

J. WILDER MAY.

## DIGEST OF THE ENGLISH LAW REPORTS FOR AUGUST, SEPTEMBER, AND OCTOBER, 1876.

ACTION AGAINST PUBLIC OFFICER. — See FRIVOLOUS SUIT.

### AMALGAMATION OF COMPANIES.

C. insured his life in the I. Company, without becoming a member, or entitled to vote. By the deed of settlement of the I. Company it was provided that a board of directors should have power to dissolve the company and conclude its business; and in such case the immediate demands against the company should be paid out of its funds, and the payment of its future obligations should be made by some other company, with which an arrangement to that effect should be made. Subsequently such an amalgamation of the I. Company was effected with the P. Company. Under it the P. Company was to assume and pay all the outstanding claims against the I. Company, as they came due. C., though not properly a member of the I. Company, and not entitled to a vote, had notice of the negotiations looking to the amalgamation, but not that it was finally effected. The business was then carried on under the name of the P. and I. Company; and C. paid the new company his premiums for fifteen years. Subsequently the P. Company was incorporated with and took the name of the E. Society; and finally the I. Company and the E. Society were both ordered to be wound up. *Held*, that C. could not be considered a creditor of the I. Company in the winding-up proceedings. *In re European Assurance Society Arbitration Acts, and Industrial and General Life Assurance and Deposit Company. Cocker's Case*, 3 Ch. D. 1.

ANNUITY. — See RESIDUARY LEGATEE.

ARBITRATION CLAUSE. — See COVENANT.

### BAILMENT.

1. Plaintiff left two parcels worth £60 with a servant of the defendant railway company, paid for their deposit without declaring their value, and received therefor a ticket headed "Luggage and cloak office," and bearing on its face, in plain type, a reference to conditions on the back. Among these conditions was one stating that the company would not be responsible for more than £5 value, unless the extra value was declared and paid for, and that "the company will not be responsible for loss of or injury to articles except left in the cloak-room." Plaintiff knew there were conditions on the ticket, but did not know what they were. The parcels were left by the servant in an exposed place, instead of putting them in the "Luggage and cloak office," referred to on the ticket, and a thief made off with them. *Held*, that the plaintiff could not recover although the parcels were not put into the cloak-room, because the conditions on the ticket were binding, and the plaintiff must be held to have had knowledge of them. *Harris v. The Great Western Railway Co.*, 1 Q. B. D. 515.

2. Plaintiff left his bag, worth £24 12s., at the cloak-room of defendant's station, and received a ticket therefor, on the face of which was the date and number of it, and the time of opening and closing the cloak-room, and the words "See Back." On the back it was stated that the company would be responsible only to the amount of £10. There was also a notice to this effect hung in the cloak-room in a conspicuous place. The jury found as a fact that the plaintiff did not read his ticket, and did not know of the condition on the back, and that, as a reasonably careful man, he was under no obligation to make himself aware of said condition. *Held*, that the company was liable for the value of his bag. *Parker v. The South-eastern Railway Co.*, 1 C. P. D. 418.

BANKER. — See **BILLS AND NOTES**, 3.

BASE FEE. — See **TENANT IN TAIL**.

#### BILL OF LADING.

By a bill of lading, 306 packages of tea, shipped on board the *Medway* at London for Montreal, for the appellants, were "to be delivered from the ship's deck where the ship's responsibility shall cease at the port of Montreal . . . unto the Grand Trunk Railway, and by them to be forwarded thence to the station nearest Toronto, and at the aforesaid station delivered to" the appellants or their assigns. There was a list of exceptions to liability, and then the clause, "No damage that can be insured against will be paid for, nor will any claim whatever be admitted, unless made before the goods are removed." The ship arrived May 2d or 3d. The tea was unloaded and placed in shipping-sheds. From the shipping-sheds it was removed to the railway freight-sheds on the 6th, 9th, and 12th of May, and delivered at the appellant's warehouse in Toronto on the 13th, 16th, and 17th of May. The shippers were informed by the appellants of damage to the tea on the 30th of May. *Held*, that the clause, "Nor will any claim whatever be admitted unless made before the goods are removed," referred to the removal of the goods from the railway station rather than from the ship, and that not merely patent damage, but latent damage, that an examination at the station would have revealed, was meant. Appeal dismissed. *Moore v. Harris*, 1 App. Cas. 318.

#### BILLS AND NOTES.

1. 16 & 17 Vict. c. 59, § 19, provides, that, if a check is presented to a bank "which shall, when presented for payment, purport to be indorsed by the" payee, the bank shall not be liable by paying the same, &c. Plaintiffs did business in their own name, and also as "S. & Co., Agent, K." In payment for goods bought of the latter concern, defendants gave checks payable to "S. & Co. or order," to K., who indorsed the checks: "S. & Co., per K., Agent," got the money, and misappropriated it. *Held*, that the defendants were not liable to the plaintiffs in any form. *Charles v. Blackwell*, 1 C. P. D. 548.

2. The plaintiffs in New York purchased a draft of S. & Co. for £1,000 on S., P., & Co. in London, payable to the order of the plaintiffs. They indorsed it to W. & Co., of Bradford, England, and enclosed it in a letter to W. & Co.

for transmission. The letter was placed in the "Letter Box" in the plaintiffs' office, where their letters for the post were usually put. It was stolen by one of their clerks whose duty it was to take the letters to the post-office, and in the course of a fortnight it was presented to defendants' bank, with a forged indorsement by W. & Co. to C. or order, and the blank indorsement of C., the bearer. Defendants received the draft, stamped it with their bank stamp, sent it to S., P., & Co., got the money on it, and turned the money over to the bearer. Evidence was offered at the trial to show that it was the general custom to send a letter of advice with a draft, or on the next steamer when a foreign remittance was made. This evidence was rejected. *Held*, that an action for money received to the plaintiffs' use would lie; that there was no evidence of negligence to estop the plaintiffs from setting up their title to the draft; and that the evidence in question was properly rejected. *Arnold v. Cheque Bank. Same v. City Bank*, 1 C. P. D. 573.

3. A check drawn by the plaintiff on M. & Co., his bankers, payable to the order of P., and crossed "L. and C. Bank," was stolen from P., and his indorsement forged. It was then offered to defendant, who, after telegraphing to M. & Co., and receiving word that the check was good, took it in good faith and gave it to his bankers for presentation. Meantime P. learned his loss, wrote to plaintiffs about it, and asked for another check, which was sent him. Afterwards the first check was presented to M. & Co. by the L. and C. Bank, and was paid in spite of the crossing on its face. Subsequently the second check was presented to M. & Co., and paid. The jury found everybody concerned, except the defendant, had been guilty of negligence in the matter. *Held*, that the action could be maintained, as the defendant acquired no title to the check, and M. & Co. paid the first check without authority. *Bobbett v. Pinkett*, 1 Ex. D. 368.

BOND BY SHIPMASTER. — See COLLISION, 2.

#### BROKER.

H. & Co., fruit-brokers, gave the plaintiff a sold-note as follows: "We have this day sold to you, on account of James Morand & Co., 2,000 cases oranges," which they signed with their own name merely. In an action against the brokers for non-performance, *held* that they intended to bind their principals, and that they were not liable as principals themselves. *Gadd v. Houghton*, 1 Ex. D. 357.

See PRINCIPAL AND AGENT, 2.

CARRIER. — See COMMON CARRIER.

CHARTERPARTY. — See FREIGHT.

CHECK. — See BILLS AND NOTES, 1, 2, 3.

#### CLASS.

1. A testator left an aggregate fund to trustees to pay the income to his wife, and on her death to apply the income to the support of "such child or children of mine then living, and of the issue of my child or children then deceased, . . . until my youngest surviving child shall have attained the age of twenty-one years." At that time, the trustees were to make certain sales of

real estate, and to stand possessed of the whole fund in trust for "my child or children then living, and the issue then living of my child or children dying before that period," the shares of the children to be paid immediately, the shares of the other issue at marriage or the age of twenty-one. The youngest child became twenty-one in 1862. The widow died in 1874, and several of the children had died before her. *Held*, that the class to take was to be ascertained at the widow's death, and the personal representatives of a child dying before that time took nothing. — *In re Deighton's Settled Estates*, 2 Ch. D. 783.

2. A testator gave the residue of his estate to trustees in trust to pay the income to R. M. for his life, and at his death to pay the trust fund to his sister's female children "on their attaining the age of twenty-one years, or marrying with the consent of their parents." R. M. died in 1870, at which time the testator's sister was a widow with two daughters. In 1875, one daughter married with her mother's consent, and she and her husband petitioned for the transfer of a half of the residue of testator's estate. *Held*, that the "consent of parents" must mean, "parents or parent, if any," so that when the daughter married with her mother's consent she took a vested interest, and the class to take was to be fixed when an individual of it became absolutely entitled. — *Dawson v. Oliver-Massey*, 2 Ch. D. 753.

CLOAK-ROOM TICKET. — See BAILMENT, 1, 2.

COLLATERAL COVENANT. — See COVENANT.

#### COLLISION.

1. An Inman steamer, going at ten and a half knots an hour, on a dark night, between Queenstown and Liverpool, overtook and ran down a bark having no light astern. The bark saw the steamer a quarter of an hour before the collision, but had not time enough to run up a light before they struck. The steamer did not see the bark. *Held*, that the steamer was liable, and that there was no contributory negligence on the part of the bark. — *The City of Brooklyn*, 1 P. D. 276.

2. A steamer, bound to a port for a perishable cargo of fruit, negligently ran into a sailing-vessel; and the master of the steamer, to avoid detention, and in good faith, gave a bond binding himself and his owners to pay the damage done. In an action against the vessel by the captain for wages and disbursements, including the amount of the penalty of the bond, *held* that the amount of the penalty must be held in court to abide the result of any claim preferred against the captain in respect of the bond. — *The Limerick*, 1 P. D. 292.

COMMISSION FOR INTRODUCING PURCHASER. — See COMPANY, 2; CONSTRUCTION OF CONTRACT.

#### COMMON CARRIER.

The plaintiff shipped two horses on a steamer belonging to defendant, for transportation. There was no bill of lading. In a storm of more than usual violence, partly from the rolling of the ship in the heavy sea, and partly from struggling from fright, one of the horses was so injured that she died. The



jury expressly found that there was no want of due care on the part of the defendant, either in taking proper measures beforehand for guarding against storms, or in the treatment of the horse at the time of the storm and afterwards. *Held*, that the defendant was not liable. "Act of God" defined by COCKBURN, C. J. — *Nugent v. Smith*, 1 C. P. D. 423; s. c. 1 C. P. D. 19; 10 Am. Law Rev.

#### COMPANY.

1. An unlimited company of more than twenty members, and not registered as the statute required, was formed in 1871. In 1873 it transferred its assets and debts to a limited company, and, in the proceedings of winding up, the solicitors employed by the original company in forming it presented a bill for services. *Held*, that the solicitors' claim could not be allowed, as the services for which they claimed were illegal, the whole formation of the original company being contrary to statute. *Quære*, if either a member or creditor of a company not formed in accordance with the Companies Act can have it wound up by the court. — *In re South Wales Atlantic Steamship Co.*, 2 Ch. D. 763.

2. S., owner of ironworks, made an agreement with W. and H. to pay them £1,500, if the latter should form a company within three months, and have it purchase the works at a valuation. A week or two later, S. made an agreement with W. for the purchase of the works by a company of which W. was to act as trustee. Subsequently, but not within three months, W. and H. got up a registered company, with seven directors. The company adopted the agreement to purchase made with W., and the directors were to pay the expenses of getting up the company. They were not, however, informed of the agreement made by S. to pay H. and W. £1,500. Nobody took shares besides the directors; and the company was wound up. H. and W. put in a claim for their services, and the valuer for his. *Held*, that the fraud on the directors in concealing from them the agreement between S. and H. and W., together with the fact that the company had derived no benefit from the services of the latter, precluded any claim for compensation, and that the valuer must look to H. and W. for his pay. — *In re Hereford & South Wales Waggon & Engineering Co.*, 2 Ch. D. 621.

See CONTRIBUTORY, 1, 2; ESTOPPEL.

CONCEALMENT. — See COMPANY, 2; MARINE INSURANCE, 1.

CONDITION ON TICKET. — See BAILMENT, 1, 2.

CONSIDERATION. — See PRINCIPAL AND AGENT.

CONSPIRACY. — See FRIVOLOUS SUIT.

#### CONSTRUCTION OF CONTRACT.

Defendant wrote the plaintiffs thus: "The land and premises of the B. Works are my property solely, but the business of it is carried on by myself and my partner. In case of your introducing a purchaser of all the premises, or part of them, of whom I shall approve, or in case of your introducing capital which I should accept, I could pay you a commission of five per cent on the amount in either case, provided no one else is entitled to a commission in

respect of the same introduction." The plaintiffs procured one W. to lend defendant £10,000, and they were paid their commission of five per cent therefor. Subsequently W. advanced £4,000 more, under an agreement with the defendant for a partnership. Plaintiffs claimed commission on this sum, but admitted that the advance of the £4,000 was not contemplated when the £10,000 was advanced, and that the £4,000 advanced was the result of negotiations between defendant and W. about a partnership. *Held*, that the plaintiff could not recover. — *Tribe v. Taylor*, 1 C. P. D. 505.

See CONTRACT, 2.

CONSTRUCTIVE TOTAL LOSS. — See MARINE INSURANCE, 2.

CONTINGENT INTEREST. — See MARRIAGE SETTLEMENT.

### CONTRACT.

1. The defendants bought rice of the plaintiffs, to be shipped at Madras 'during the months of March <sup>and</sup> April, 1874, about 600 tons, per *Rajah*, of Cochin." The 600 tons filled 8,200 bags; of which 1,780 bags were shipped Feb. 23, 1,780 bags Feb. 24, 3,580 bags Feb. 28, and the remaining 1,080 bags on Feb. 28, with the exception of 50 bags, which were shipped March 3, on which day the bill of lading for the last 1,080 bags was signed. The defendants refused to accept the rice upon its arrival. Evidence was given that rice shipped in February would be the spring crop, and equally good with rice shipped in March or April. *Held*, that the defendants were not bound to accept the rice. — *Shand v. Bowes*, 1 Q. B. D. 470.

2. The plaintiff contracted with the defendants to construct some dock-works. There was in the contract provision for a penalty of £100 a week in case the works were not completed on or before Aug. 31, 1873. The works were not completed on that date, and on Jan. 22, 1874, the defendants gave notice to the plaintiff to terminate the contract; and they at the same time seized the materials and implements of the plaintiff, under the following clause in the contract: "Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works to the satisfaction of the engineer, his contract shall, at the option of the company, be considered void, as far as relates to the works remaining to be done; and all sums of money due the contractors, together with all materials and implements in his possession, and all sums named as penalties for non-fulfilment of the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract." There was a clause providing that if the works were not completed "within the period limited for that purpose," it should be lawful for the company to assume control of and finish them, in which case the contractor should be paid only for the work he had done. *Held*, that the forfeiture of the sums of money, materials, and implements, as set forth in the above clause, could only be enforced before the expiration of the time limited for the completion of the contract. — *Walker v. The London & North-western Railway Co.*, 1 C. P. D. 518.

See PRINCIPAL AND AGENT, 1.

CONTRACT TO SELL. — See VENDOR'S LIEN.

## CONTRIBUTORY.

1. D., a shareholder in the E. Company, transferred, Feb. 26, 1859, his shares to trustees for the P. P. Company, in pursuance of an arrangement approved by the majority of the shareholders of the E. Company to amalgamate with the P. P. Company. The transfer of D.'s shares was not enrolled in chancery, as required by a private act of Parliament. The E. Company gave up business; and, Jan. 20, 1873, it was wound up. The private act of Parliament provided, that, although a shareholder should be liable until his transfer of shares was duly enrolled in chancery, yet that he should be "entitled to be reimbursed out of the funds of the company for all losses sustained in consequence thereof; further, that he should not be liable, except so far as "he would have been liable as a partner;" and that no party could recover more from an individual shareholder than could "have been recovered if this act had not been passed." *Held*, that it would be idle to make him a contributory on the ground that the transfer of his shares had not been enrolled, since whatever he would pay as contributor must be at once repaid him under the other provisions of the act. — *In re European Assurance Society Arbitration Acts. Doman's Case*, 3 Ch. D. 21.

2. R., a stockholder in the B. C. Insurance Company, assigned his shares to a trustee for the B. N. Insurance Company, in pursuance of an arrangement approved by the majority of the stockholders of the B. C. Company to transfer its business to the B. N. Company. R. was paid for his shares out of the assets of the B. C. Company; but it was not shown that he knew this. In accordance with a private act of Parliament, the transfer of R.'s shares was enrolled in chancery, as he thought, at once, but really not till four years after the transfer. On the winding up of the B. C. Company some years afterwards, when it was decided that the B. C. policies were still good against that company, it was held that R. was not a contributory. — *In re European Assurance Society Arbitration Acts. Rivington's Case*, 3 Ch. D. 10.

CONTRIBUTORY NEGLIGENCE. — See COLLISION, 1.

## COVENANT.

Covenant by a lessee to keep only such a number of hares and rabbits as should not injure the crops, &c.; and in case he kept a greater number, he should pay a fair compensation for the damage, to be fixed, in case of disagreement, by two arbitrators. In an action for breach of the covenant to keep only such a number, *held* that the action could be maintained before an arbitration, the clause as to arbitration being a distinct and collateral covenant. *Dawson et al. v. Lord Fitzgerald*, 1 Ex. D. 257.

CREDITOR WITH NOTICE. — See JOINT DEBTOR.

DAMAGE TO CARGO. — See BILL OF LADING.

DAMAGES, MEASURE OF. — See MEASURE OF DAMAGES.

## DEAF MUTE.

A deaf mute was found guilty of felony, but the jury also found that the prisoner was not capable of understanding, and did not understand, the proceedings against him. *Held*, that the prisoner could not be convicted; and

it was ordered that he be detained as of insane mind during the Queen's pleasure. — *The Queen v. Berry*, 1 Q. B. D. 447.

#### DEBENTURES.

The R. Company, by its directors duly authorized, issued one hundred certificates of indebtedness, or "mortgage debentures," at 95. Sixty of them were sold, and forty were issued to C. & C., as trustees for the company. Subsequently the R. Company pledged the other forty to secure a loan of £10,000. at ten per cent, with power of sale in the pledgee. On the winding up of the company there were considerable assets; and the pledgee claimed to prove for the £10,000, and to share *pari passu* with the other debenture-holders. *Held*, that the claim should be allowed, and that the pledge was not *ultra vires*. — *In re Regent's Canal Ironworks Co.*, 3 Ch. D. 43.

DEBT OF HONOR. — See INFANT.

DELIVERY OF CARGO. — See BILL OF LADING.

DISCOVERY. — See PRODUCTION OF DOCUMENTS.

DISTRIBUTION. — See TRUST TO SELL.

DOCUMENTS, INSPECTION OF. — See INSPECTION OF DOCUMENTS.

#### ESTOPPEL.

A company, formed to build a railway, improperly went on when only one-fifth of the capital stock was taken. In a bill filed by a shareholder to avoid his contract to take shares, it appeared that, for a long time after the company was to his knowledge proceeding illegally, he continued to act with the other members of it, and did not protest against the improper and illegal acts. *Held*, that, though he might have originally had a ground of relief, he had lost it by acquiescence. — *Sharpley v. Louth & East Coast Railway Co.*, 2 Ch. D. 663.

See BILLS AND NOTES, 2; VENDOR'S LIEN.

EQUITABLE OWNER. — See INSURANCE.

EVIDENCE. — See BILLS AND NOTES, 2.

#### FORCIBLE ENTRY.

L. was mortgagee in fee of premises, but did not take actual possession. T. and W. occupied the premises under the mortgagor, who had never been dispossessed. L. one day had a carpenter take off the lock of one of the doors, and he entered into possession. T. and W. entered by a window and expelled L. L. had them indicted for forcible entry. They were acquitted, and sued L. for malicious prosecution without reasonable and probable cause. *Held*, that the action could not be maintained. If L. got the legal possession for civil purposes, that was ground enough for an indictment against T. and W. for forcible entry. — *Lows v. Telford et al.*, 1 App. Cas. 414.

FOREIGN JUDGMENT. — See MARINE INSURANCE, 2.

FORFEITURE. — See CONTRACT, 2.

FORGED INDORSEMENT. — See BILLS AND NOTES, 2, 3.

FRAUD. — See COMPANY, 2.

FRAUDS, STATUTE OF. — See STATUTE OF FRAUDS.

## FREIGHT.

Charterparty by the defendants to convey a cargo of railway iron from England to Taganrog, Sea of Azof, "or so near thereto as the ship could safely get," consigned to a Russian railway company. The ship arrived Dec. 17, at Kertch, a port thirty miles from Taganrog, where the captain, the plaintiff, found the sea blocked up with ice, and unnavigable till April. Against the orders of the charterers, who notified him that they would hold him responsible, he proceeded to unload the cargo; and, there being nobody to receive it, he put it in charge of the custom-house authorities there. The consignees claimed it; and, on their producing the bills of lading and charterparty, it was delivered to them against the captain's claim that it should be retained for freight. A receipt was given to the effect that the cargo was received "on the power of the charterparty and the bill of lading." *Held*, by MELLOR and QUAIN, JJ., that the captain was entitled to no freight; by COCKBURN, C. J., that he ought to have freight *pro rata*. *Melcalfe v. The Britannia Ironworks Co.*, 1 Q. B. D. 613.

## FRIVOLOUS SUIT.

The court will stay summarily as frivolous and vexatious an action brought for conspiring to make, and making, false statements about the plaintiff, if the defendants come in and show that they did all that they did as members of a military court of inquiry, and in the performance of their official duty. — *Dawkins v. Prince Edward of Saxe Weimar. Same v. Wynyard. Same v. Stephenson*, 1 Q. B. D. 499.

FUND IN COURT. — See MARRIAGE SETTLEMENT.

GOOD-WILL. — See MORTGAGOR AND MORTGAGEE.

INDORSEMENT OF CHECK. — See BILLS AND NOTES, 1, 2, 3.

## INFANT.

B., being of full age, promised to pay, "as a debt of honor," a debt contracted when under age. Such a promise is not a "ratification of the contract made during infancy," as a "debt of honor" cannot be enforced at law. — *Maccord v. Osborne*, 1 C. P. D. 569.

## INSPECTION OF DOCUMENTS.

Letters written and sent for the confidential and private information of the solicitor of a party in a future suit, and having reference to the subject-matter thereof, are not privileged. But if they are written in reply to the application of such solicitor, with a view to using the information so obtained in the suit, the case is otherwise. — *M'Corquodale v. Bell*, 1 C. P. D. 471.

INSUFFICIENT ASSETS. — See RESIDUARY LEGATEE.

## INSURANCE.

D. became owner of a vessel in December, 1868, and the plaintiff equitable mortgagee. D. applied for insurance on the vessel in the defendant company in January, 1869, ordering the policy made in plaintiff's name, and sent to him. The policy, in the usual form, was made in the name of D., but sent

to plaintiff. D. did not inform the defendant company that plaintiff was equitable mortgagee. In the policy, *inter alia*, was this: "This is to certify that Mr. D., as ship's-husband for the H., whereof is master at the present time D., has this day paid £17 10s. for insurance . . . on said vessel." In January, 1870, while the vessel was on a voyage, plaintiff took out a policy like the preceding, but in his own name as ship's-husband. In March, 1870, plaintiff, on application of the defendant company, paid the yearly assessment for losses, and received a receipt therefor as husband of the said vessel. In October, 1870, he paid another. In May, 1870, D. transferred the vessel to the plaintiff, who became registered owner. The defendant company had no notice of this. Later, D. put in a claim for the loss of an anchor. In November, 1870, the vessel was lost, and in December plaintiff put in a claim for the insurance. In January, on request of the company, D. attended a meeting of the directors to consider the claim. After his withdrawal they resolved that there was no claim. In April, 1871, another meeting was held, which came to a similar resolution; but D. was not notified, and the plaintiff had no notice of either meeting. Neither D. nor the plaintiff had signed, or been asked to sign, the articles. The company was a limited mutual insurance company. Every person insuring a ship in the company was a member, provided he signed the articles. The directors were to manage the affairs of, and act fully for, the company, with full power to settle disputes between members and the company; and no member could bring suit against the company, except as thus provided. If any member sold his ship, the new owner was to have no claim upon the company for loss. In case of loss, the directors were to summon the owner, master, or crew, as they saw fit, and make inquiry as to the loss. *Held*, reversing decision of the Queen's Bench, that the plaintiff could recover. (ARCHIBALD, J., and POLLOCK, B., dissenting.) — *Edwards v. The Aberayron Mutual Ship Insurance Society*, 1 Q. B. D. 563.

#### JOINT DEBTOR.

The defendants, R. and H., who were partners, had been in the habit of consigning goods through the plaintiffs to B. and S. for sale, the proceeds to be remitted by B. and S. to the plaintiffs. By an agreement in writing between plaintiffs and R. and H., these remittances were to be held to pay any advances made by plaintiffs on account of R. and H.; and the balance was to be sent to R. and H. The practice was for the defendants to draw on the plaintiffs, who accepted the drafts; and the defendants discounted their acceptances. In case the goods were not sold in season for the acceptances to be met, the defendants made a new draft, which the plaintiffs accepted. Thus the plaintiffs got new funds to meet the old acceptances, and the defendants got further time. This course continued for five years, at the end of which time R. and H. dissolved partnership. At that time there were goods in the hands of B. and S. for sale, and the plaintiffs had, on the security of them, accepted R. and H.'s drafts. H. went on with the business, and drew new drafts in the same manner, in the name of "R. and H., in liquidation." A year after the dissolution, H. informed plaintiffs that R. had withdrawn, and that he (H.) would go on with the business. Plaintiffs afterwards accepted R.'s drafts in the manner above described, by the discount of which they were saved cash advances. The action was

brought partly for advances which had been renewed by "R. and H., in liquidation," partly for advances which had been renewed by H.'s draft alone, accepted by plaintiffs. *Held*, that the plaintiffs had a right to treat both R. and H. as principal debtors, and that R. was not discharged by the extension of time given H. in pursuance of the practice of the parties. — *Swire et al. v. Redman & Holt*, 1 Q. B. D. 536.

LACHES. — See ESTOPPEL.

#### LEASE.

The *habendum* of a lease stated the term as 94½ years, the *reddendum*, as 91½. The counterpart of the lease signed by the lessee had 91½ in both parts. *Held*, that the *habendum* must control the *reddendum* in the lease itself, and that the counterpart must be made to follow the lease, and that the term was therefore 94½ years. — *Burchell v. Clark*, 1 C. P. D. 602.

LIABILITY OF MASTER. — See COLLISION, 2.

LIABILITY OF SHIP-OWNER. — See BILL OF LADING.

LIEN. — See VENDOR'S LIEN.

LIFE INSURANCE. — See AMALGAMATION OF COMPANIES.

LIMITATIONS, STATUTE OF. — See STATUTE OF LIMITATIONS.

#### LIS ALIBI PENDENS.

The C. C., and the H. W., two steamers, came in collision in the harbor of Cork. The H. W. brought an action *in rem* against the C. C., in Cork; the latter was arrested, and gave bail. The C. C. then brought a cross-action against the H. W. Subsequently the H. W. wished to abandon her suit in Ireland, but she had meanwhile begun another suit *in rem* in England for the same cause, and the Irish court refused to dismiss the action. On motion of the C. C., *held* that the action in England should be stayed, pending the suit in the Admiralty Court of Ireland. — *The Cattarina Chiazzare*, 1 P. D. 368.

#### MALICIOUS PROSECUTION.

The declaration set forth that defendants falsely and maliciously wrote and published a certain notice, requiring the plaintiff, under the Insolvent Act of Canada, to make an assignment of his property for the benefit of his creditors, as certain promissory notes on which the plaintiff was liable to the defendants and others had long been overdue, and were unpaid. In another count, it was complained that the defendants maliciously, and without probable cause, had the plaintiff arrested, in a suit on certain promissory notes indorsed to the defendants by the plaintiff, on the ground that he was about to leave the country; when the court subsequently found that he was not about to leave the country, and ordered his discharge. The defendants replied to the first count, that the notice in question was true, and was not published, except to the plaintiff. To the last count they replied simply, that the note was long due, and that they had been informed, and believed, the plaintiff intended to leave. The court ruled, that, unless the defendants believed that they would lose their debt unless they had the defendant arrested, or if they acted with the idea of pro-

protecting other indorsers who might otherwise be liable to them, there would be evidence of want of reasonable cause for the arrest sufficient to justify damages. *Held*, error in the charge, and that the said notice was a legal proceeding, and *prima facie* privileged. — *Bank of British North America v. Strong*, 1 App. Cas. 307.

See FORCIBLE ENTRY.

#### MARINE INSURANCE.

1. The brig *Jessie*, from Falmouth, arrived at Mazagan, in Morocco, Dec. 27, 1874. Jan. 1, 1875, she was driven from her moorings in a gale, and lost her anchor. On the 9th, the captain wrote the plaintiff, who was owner, but said nothing about the loss of the anchor. The letter reached the plaintiff on the 24th, and, just a month later, the plaintiff, having had no further news of the vessel, had her insured in the defendant company, "lost or not lost." He said to the company's agent, "I do not know when she was ready to sail; I have not had the sailing letter yet." The usual time for loading at Mazagan was fifteen to twenty days, and for the voyage home, twenty-five to thirty, and the course of the post was irregular. After verdict for plaintiff, a motion to enter verdict for defendants, on the ground that the failure by the captain to mention the loss of the anchor constituted a material concealment, was refused. *Quære*, if a failure to communicate such a fact forms a defence, unless fraudulent. — *Stribley v. Imperial Marine Ins. Co.*, 1 Q. B. D. 507.

2. Action on a valued policy of insurance on a cargo of rye in the Austrian ship *U.*, from Enos to Schiedam, free of "particular average," and with a "sue-and-labor" clause, underwritten by the defendant. The rye was shipped sound and in good order. The captain signed the bill of lading. On the voyage the *U.* met with bad weather, and was obliged to jettison a part of the cargo; and, Jan. 14, 1866, she put into La Rochelle, France, disabled. At the instance of the captain certain proceedings were taken in the Tribunal of Commerce there, and in accordance therewith the cargo was landed and warehoused, and a part sold; and, Feb. 21, on the petition of the captain, the rest was ordered to be sold at auction. When the owners of the rye, who are the plaintiffs, heard of this, they gave notice of abandonment to the defendant, on the ground that experts had found the rye unfit to transport; which notice he refused to accept, and, March 5, summoned the captain before the Tribunal, to have it decreed that the rye need not be sold, and to have a new survey. The Tribunal suspended the sale ordered, and appointed new experts, who reported, March 14, that the rye could be reshipped to Schiedam. The report was ordered to be executed by the Tribunal, and notice sent to the plaintiff. Persons who had made advances to the captain then brought suit in the Tribunal; the captain gave notice of it to the defendant and the holder of the bill of lading, and, Sept. 14, the Tribunal ordered the sale of the ship, and a statement of general and particular average of the ship and cargo, to be made. Oct. 21, the Tribunal decreed the sale of the rest of the cargo, and that the proceeds should be paid to the parties who had made advances to the captain; and, Jan. 25, the Tribunal decreed that the whole amount of freight from Enos to Schiedam was due and chargeable to the proceeds of



the residue of rye sold. The plaintiffs were summoned in the action, but made default; the defendants had no notice. It was admitted that the decree of Jan. 25 was in accordance neither with French nor with Austrian law. Question: Was there a constructive total loss? if not, can plaintiff recover any portion of the expenses at La Rochelle under the "sue-and-labor" clause in the policy? *Held*, that the judgment of the foreign court, being confessedly erroneous according to the foreign law, was not binding; that there was no constructive total loss, but that the plaintiffs could recover under the "sue-and-labor" clause whatever expense was incurred in unshipping the cargo, &c., in order to prevent a total loss. — *Meyer v. Ralli*, 1 C. P. D. 358.

#### MARRIAGE SETTLEMENT.

Where a husband, by a post-nuptial settlement, made a covenant to settle on his wife any property to which she was, or during the marriage should become, entitled, it was *held* that a fund in court, then contingent, and which came into possession after her death, was included. — *Agar v. George*, 2 Ch. D. 706.

#### MARSHALLING ASSETS.

Testator made several pecuniary legacies, and devised a specific real estate to one son, and the residuary real estate to another. There was not enough personalty to pay the debts besides the legacies. *Held*, that the pecuniary legacies must be exhausted in making up the deficiency before resorting to the real estate. — *Farquharson v. Floyer*, 3 Ch. D. 109.

#### MASTER AND SERVANT.

1. The defendants employed the plaintiff with other workmen, and also a steam-engine, with an engineer, in sinking a shaft in their colliery. When the work was partly done they employed W., under a verbal contract, to finish it. W. was to employ and pay the plaintiff and the other workmen. The engine and engineer were under his control, but the engineer's wages were to be paid by the defendants. The plaintiff was injured through the negligence of the engineer. *Held*, that the defendants were not liable. — *Rourke v. The White Moss Colliery Co.*, 1 C. P. D. 556.

2. The S. Club, composed of persons interested in agriculture, made an agreement with the defendant company for the use of the company's hall for their annual shows. By this agreement the hall was, during the times of the shows, at the entire disposal of the club. The company was to provide accommodation for the stock and things exhibited, and provide and pay a sufficient body of men to do all the work about the show, and who should be under the exclusive control of the club. The company was to pay £1,000 to the club at each show, and be at liberty to charge and receive an admission fee of 1s. The club was to have entire and exclusive control of the show while it was in progress. The club contracted with one S. to see to admitting the stock, &c., at the gate, to its disposition, and to its delivery. He admitted and delivered on orders signed by the club, and was paid in the lump for the whole job. Plaintiff bought some sheep of an exhibitor at the show, and got an order to S. for their delivery. S. delivered him other sheep in place of his own. *Held*,

that the defendant company was not liable. — *Goslin v. The Agricultural Hall Co.*, 1 C. P. D. 483.

3. Contract in writing, as follows: "I hereby accept the command of the ship C. C., on the following terms: Salary to be at and after the rate of £180 per annum." "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command; and the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins ship." The captain was dismissed, not for misconduct, but without notice. *Held*, that the captain was entitled to reasonable notice under this contract. — *Green v. Wright*, 1 C. P. D. 591.

#### MEASURE OF DAMAGES.

The plaintiff, who was contractor for the construction of a tramway with a tramway company, contracted with defendants that they should lay with asphalt and maintain in good order for twelve months the said tramway. Within the twelve months, one H., driving over the road, was thrown out and hurt, in consequence of the defective condition of the asphalt. H. sued the tramway company, who gave notice to the plaintiff. Plaintiff gave notice to the defendants. They refused to settle; and plaintiff, by negotiation, finally settled by paying £110: £70 damages, and £40 H.'s costs. He sued for these sums, together with £18 costs of his own in getting the claim reduced. *Held*, that the defendants were only liable for the £70 damages. — *Fisher v. The Val de Travers Asphalte Co.*, 1 C. P. D. 511.

#### MISTAKE.

G. P. R., an undischarged bankrupt, ordered goods from a firm under his old firm name of "J. R. & Co., Mincing Lane, Plymouth." The firm sent them, thinking the order was from "R. Bros. & Co., Old Town St., Plymouth," with whom they had had dealings. G. P. R.'s trustee in bankruptcy seized and claimed the goods, and the sellers, learning the mistake, sued to recover them. *Held*, that no property in them had passed, and the trustee must restore them. — *In re Reed. Ex parte Barnett*, 3 Ch. D. 123.

#### MORTGAGOR AND MORTGAGEE.

P., lessee of certain dock premises, and the machinery movable and immovable thereon, for twenty-one years, mortgaged the same to L. & Co. Afterwards a railway company gave notice to P. to buy the premises for the railway under the Lands Clauses Act. P. died; and L. & Co. took possession, and gave notice to the railway company that they wished the compensation settled by arbitration. The company, and the executors and mortgagees, concurred in the appointment of an umpire; and he made an award of a certain sum, including £2,800 "in respect of trade profits which would have accrued if the premises had not been taken" by the railway company. The executors claimed this sum. *Held*, that it belonged to the mortgagees. *Pile v. Pile. Ex parte Lambton*, 3 Ch. D. 36.

MUTUAL INSURANCE. — See INSURANCE.

NEGLIGENCE. — See BILLS AND NOTES, 2, 3.

NEGLECTANCE OF FELLOW-SERVANT. — See MASTER AND SERVANT, 1.

NOTICE. — See MASTER AND SERVANT, 3.

PARTNERSHIP. — See JOINT DEBTOR.

#### PATENT.

Three referees were appointed under an act of Parliament to inquire into the impurities of the London gas, with right to require the gas companies to afford them facilities for their investigations. As a result of their examinations, one of the number thought he had discovered a method of securing greater purity in the gas. The impurities complained of came from certain compounds of sulphur. The defendant company had experimented on the matter, and had been using lime in the purifiers. This, with the contents of the purifiers, formed sulphide of calcium, with which the sulphur impurities combined. The carbonic acid of the gas impeded the action of the sulphide of calcium, and the result was, the gas came out too impure for use, and could not always be relied on to come out with the same degree of purity. The gist of the plaintiff's change consisted in keeping more lime in the first set of purifiers. In this way the carbonic acid was more effectually removed, and the subsequent processes of removing the sulphur impurities by sulphide of lime were much more effective. The change was suggested to the defendant company by the referees, and the latter tried it, with success. The referees made their report, incorporating these suggestions and experiments; but the report was withheld from publication, to enable the plaintiff to get out a patent. *Held*, that the plaintiff's idea only amounted to a more thorough application of something in use before. *Quære*, whether a public official can patent the results of an official investigation. *Patterson v. Gaslight & Coke Co.*, 2 Ch. D. 812.

#### PETITION OF RIGHT.

English merchants were authorized by the law of China to trade only with members of a guild called the Cohong. War broke out between England and China, the Cohong was abolished, and the English merchants lost their only remedy, which was against the Cohong. A treaty was made between the countries, under which China paid to the British government a certain sum on account of debts due from former members of the Cohong to said merchants. It was *held* that a petition of right would not lie by one of said British merchants to obtain payment of a sum of money alleged to be due from a former member of the Cohong. *Rustomjee v. The Queen*, 1 Q. B. D. 487.

POWER TO SELL. — See TRUST TO SELL.

#### PRINCIPAL AND AGENT.

1. Action for breach of the following undertaking: "I undertake to load the ship *Der Versuch*, twenty-nine keels, with Bebside coals, in ten colliery working days. On account of Bebside Colliery, W. S. Hoggett." Hoggett, the defendant, was a clerk of the colliery company, which had made a contract with B., W., & Co., to furnish them a certain amount of coal in the months of January, February, and March, "the turn to be mutually agreed upon." B., W., & Co. chartered the plaintiff's ship to convey the coal; and the plaintiff, objecting to

the provision of the charterparty as to the matter of detention in loading "in turn," the above undertaking was procured, and the charter was completed. The undertaking purported to be with nobody in particular. The vessel was detained beyond ten days, and the claim was for demurrage. *Held*, that the jury properly found that the defendant was personally bound, though he did not know he was making the undertaking in reference to a pending charter, and that there was consideration therefor. *Weidner v. Hoggett*, 1 C. P. D. 533.

2. A broker is not personally liable on a note signed by him, and running thus: "I have this day sold by your order and for your account, to my principals, five tons anthracene." *Southwell v. Bowditch*, 1 C. P. D. 374; s. c. 1 C. P. D. 100; 10 Am. Law Rev.

See **BILLS AND NOTES**, 1; **BROKER**.

**PRIVILEGED COMMUNICATION**. — See **INSPECTION OF DOCUMENTS**; **PRODUCTION OF DOCUMENTS**.

**PRIVITY**. — See **MASTER AND SERVANT**, 2.

#### PRODUCTION OF DOCUMENTS.

A banking company, having a controversy about an alleged fraudulent transfer of an account, at one of its branch offices, telegraphed to the manager of the branch office to write full particulars. In the suit that followed, the bank refused to produce the letter sent in answer to the telegram, claiming it to be privileged. *Held*, that it must be produced. *Anderson v. Bank of British Columbia*, 2 Ch. D. 644.

**PROMOTION MONEY**. — See **COMPANY**, 2.

**PROXIMATE RESULT**. — See **MEASURE OF DAMAGES**.

**PUBLIC OFFICIAL**. — See **PATENT**.

**RATIFICATION OF CONTRACT**. — See **INFANT**.

**REALTY AND PERSONALTY**. — See **MARSHALLING ASSETS**.

#### RESIDUARY LEGATEE.

A testatrix gave life annuities, and ordered funds invested to pay them. She then gave the residue of her estate, "including the fund set apart to answer the said annuities, . . . when and so soon as such annuities shall respectively cease," to J. The estate paid only 5s. in the pound, and the court ordered sums apportioned to each annuity to be invested and the income duly paid. One of the annuitants died, and J. claimed the fund out of which this annuitant had received his annuity. *Held*, that all the annuities must be paid in full before J. could take any thing as residuary legatee. *In re Tootal's Estate*. *Hankin v. Kilburn*, 2 Ch. D. 628.

**RIGHT, PETITION OF**. — See **PETITION OF RIGHT**.

**SALE**. — See **VENDOR'S LIEN**.

#### SALVAGE.

The steamer M., from Sumatra to Jedda, with 550 pilgrims, was wrecked on the Parkin Rock, in the Red Sea, two or three days' voyage from Jedda. The steamer T. came up, and her captain refused to rescue and carry to Jedda the

pilgrims for less than £4,000, the whole amount of the passage-money from Sumatra to Jedda. The captain of the *M.* at last agreed to give this amount. *Held*, that the bargain was inequitable, and must be set aside. £1,800 was awarded. *The Medina*, 1 P. D. 272.

#### SHERIFF.

A sheriff seized goods under a *fi. fa.*, and the execution creditor afterwards lost his claim under the execution by accepting a composition from the execution debtor. He gave no instructions to the sheriff how to proceed, and the sheriff sold the goods for his fees and expenses. *Held*, that the execution debtor could maintain trover or trespass against the sheriff in respect of the goods so sold. *Sneary v. Abdy*, 1 Ex. D. 299.

#### SLANDER.

In an action to impeach a testator's signature to a will to which the plaintiff was an attesting witness, the defendant testified as an expert that he thought the signature was forged. The jury found in favor of the will, and the presiding judge animadverted severely upon the hardihood of the expert. These strictures were published next day in the *Times*. Afterwards defendant was called in an action for forgery, and testified that the alleged forgeries were genuine signatures. The counsel, in cross-examination, referred to the witness' testimony in the previous case, the remarks of the judge, and the item in the *Times*, and sat down. Thereupon the witness began an "explanation" of the previous case, and, in spite of the efforts of the judge to stop him, said: "I believe that will to be a rank forgery, and I shall believe so to the day of my death." The jury found, on special questions put them by the judge, that the witness spoke these words not in good faith as a witness, nor in answer to any question, but for his own purposes, and maliciously. *Held*, that the words were privileged. *Seaman v. Netherclift*, 1 C. P. D. 540.

SOLD NOTE. — See BROKER.

#### STATUTE.

A man may be convicted and fined for "riding a horse furiously so as to endanger the lives of passengers," under the following statute: "If any person, riding any horse or beast, or driving any sort of carriage, shall ride or drive the same furiously so as to endanger the life of any passenger, every person so offending and being convicted of such offence shall forfeit a sum not exceeding £10 in case such driver shall not be the owner of such wagon, cart, or other carriage, and in case the offender be the owner of such wagon, cart, or other carriage, then any sum not exceeding £10." *Williams v. Evans*, 1 Ex. D. 277.

#### STATUTE OF FRAUDS.

The following note by W.'s solicitor to A.'s solicitor is not such as to meet the requirements of the Statute of Frauds, although a verbal agreement was made, as there stated: "W. has been with us to-day, and stated that he had arranged with your client A. for the sale to the latter of the Lion Inn for £950. We therefore send herewith draft contract for your perusal and approval." *Smith v. Webster*, 3 Ch. D. 49.

## STATUTE OF LIMITATIONS.

A writ was issued in the Common Pleas for a claim not then barred, but it was never served. After the claim was barred, but within six months of the date of the writ, the time allowed by the Procedure Act for the writ to remain in force, a bill in Chancery was brought for the same claim. *Held*, that the writ would have saved the claim in the Common Pleas, but was of no effect against the statute in proceedings in equity. *Manby v. Manby*, 3 Ch. D. 101.

SUB-CONTRACTOR. — See MASTER AND SERVANT, 2.

"SUE-AND-LABOR" CLAUSE. — See MARINE INSURANCE, 2.

## TENANT IN TAIL.

G. R. had an estate tail expectant on the death without issue of C. R., a lunatic. C. R. died without issue, and G. R. had converted his estate tail into a base fee, and died leaving a widow and children. The land was sold and the fund paid into court. G. R.'s widow and children petitioned to have the fund paid out to them. *Held*, that they must first produce a proper deed enlarging the base fee. *In re Reynolds*, 3 Ch. D. 61.

TICKET. — See BAILMENT, 1, 2.

TIME FOR COMPLETION OF CONTRACT. — See CONTRACT, 2.

TRANSFER OF SHARES. — See CONTRIBUTORY, 1, 2.

## TRUST TO SELL.

A testator left his property, including a newspaper, to his son W., and two others, trustees in trust, among other things, "to carry on, or cause to be carried on, under their inspection and control, during the life of my said wife," the newspaper. He directed a reserve fund of one-fourth part of the profits of the newspaper to be set apart each year to aid in carrying it on, and then directed the trustees to divide the remaining three-fourths of the profits of the paper, and his other property, into six parts, and to pay one part to each of his five children named, and one to his wife; and in case a child died without issue before the death of the wife, his share to go to the surviving children. Then followed: "In case any of my children shall survive my wife, and die before he shall have received his share of my trust estate without leaving issue, I give such share equally amongst my surviving children." Then came this: "And from and after the decease of my wife (or during her life if she and the majority of my children and my trustees shall think it proper and expedient so to do), at the sole discretion of my trustees, or trustee, to sell and absolutely dispose of all my real and personal estates, and my trade or profession [the newspaper], and the good-will thereof, and to divide the proceeds thereof amongst my wife and children and their issue, if the division be made in the lifetime of my wife, but if the division be made after her death, amongst my children and their issue." Then followed a provision, that, in case it was decided to sell the paper under the foregoing provisions, the eldest son should have the privilege of taking it at £500 under the market value. *Held*, that the will created an absolute trust to sell at the death of the wife, and a trust

to sell in the discretion of the trustees as to the time and manner thereof, during her life; and that at the wife's death the surviving children took equal vested shares in the newspaper and the residue of the property. — *Minors v. Battison*, 1 App. Cas. 428.

ULTRA VIRES. — See DEBENTURES.

#### VENDOR'S LIEN.

Dec. 31, 1873, the defendants sold to B. & Co. one hundred tons zinc, out of a gross lot lying on the wharf, and at the same time made two "undertakings," as follows: "We hereby undertake to deliver to your order indorsed hereon twenty-five tons zinc off your contract of this date." Jan. 7, 1874, the plaintiffs bought of B. & Co. fifty tons zinc, and paid for it. Jan. 14, B. & Co. failed, having given the defendants a bill for the zinc, which was dishonored; and the defendants refused to deliver the zinc to the plaintiffs. *Held*, that the assumed undertaking to deliver did not estop the defendants from setting up against the plaintiffs their right as unpaid vendors to stop the goods. — *Farmeloe v. Bain*, 1 C. P. D. 445.

VESTED INTEREST. — See CLASS, 1; TRUST TO SELL.

WAGES AND DISBURSEMENTS. — See COLLISION, 2.

#### WAIVER.

In bankruptcy proceedings against the holder of a lease, the lessors sent the trustee in bankruptcy a notice to disclaim the lease within twenty-eight days, as the Bankruptcy Act provided. Some letters followed; and the day before the twenty-eight days were up the lessors wrote, "We should be glad to have a reply to our letter of the 24th ult., as to whether you intend to retain the lease, at your earliest convenience." The letter of the 24th ult. contained the notice to disclaim. *Held*, that the right to a disclaimer within the twenty-eight days was waived by the lessors. — *Ex parte Moore*. *In re Stokoe*, 2 Ch. D. 802.

WAREHOUSEMAN. — See BAILMENT, 1, 2.

WILL. — See CLASS, 1, 2; RESIDUARY LEGATEE; TRUST TO SELL.

WINDING UP. — See AMALGAMATION OF COMPANIES; COMPANY, 1; CONTRIBUTORY, 1.

WITNESS. — See SLANDER.

#### WORDS.

"Act of God." — See COMMON CARRIER.

"For your Account." — See PRINCIPAL AND AGENT, 2.

"On Account of." — See BROKER.

"Receive," "Divide." — See TRUST TO SELL.

"Rider," "Driver." — See STATUTE.

## SELECTED DIGEST OF STATE REPORTS.

[FOR the present number of the Digest, selections have been made from the following volumes of State Reports: 50 California; 42 Connecticut; 54 Georgia; 75, 77, and 78 Illinois; 15 Kansas; 114 Massachusetts; 61 and 62 Missouri; 62 New York; 5 Oregon; and 9 Vroom (New Jersey Law); also from the Reports of the Supreme Court of the United States (23 Wallace, and the first volume of Mr. Otto's Reports, in continuation of Wallace, to be cited as 91 United States).]

ABATEMENT. — See APPEAL.

ACCOMPLICE. — See EVIDENCE, 3.

## ACTION.

1. Defendants not being, but pretending to be, authorized to sell plaintiff's land, made a contract to sell it to a third party. *Held*, that they were liable to plaintiff for his costs and expenses incurred in defending a suit by such third party for specific performance of the contract. — *Philpot v. Taylor*, 75 Ill. 309.

2. Defendants without license attached a wire to the chimney of plaintiff's building, whereby the chimney was caused to fall, injuring a third person in the street, who sued plaintiff for the damage. *Held*, that plaintiff might recover of defendants the amount paid by him in settlement of that action. — *Gray v. Boston Gas Light Co.*, 114 Mass. 149.

See ALIMONY; BANKRUPTCY, 6; CONTRACT, 2; EXECUTOR, 2; ILLEGAL CONTRACT, 1, 2; LANDLORD AND TENANT; NUISANCE; PARTIES; SALE, 2; TAX, 5.

ADMINISTRATION. — See EXECUTOR.

ADULTERY. — See MURDER.

## ADVERSE POSSESSION.

No title can be acquired by adverse possession of land which was dedicated to public use before the possession began. — *Hoadley v. San Francisco*, 50 Cal. 285. See LIMITATIONS, STATUTE OF, 2.

## AGENT.

Merchants sold goods at wholesale in their own names, and at their own store, on commission, and after the sales received the goods and sent them to the purchasers. *Held*, that they were "wholesale dealers," and not "commercial brokers," within the meaning of the United States internal revenue laws. (FIELD, J., dissenting.) — *Slack v. Tucker*, 23 Wall. 821.

See ACTION, 1; AUCTION; BILL OF LADING; EXECUTOR, 2; FRAUDULENT PREFERENCE, 2; LANDLORD AND TENANT; MUNICIPAL CORPORATION, 2, 3.

AGREED FACTS. — See VERDICT.



**AIDER BY VERDICT.** — See **INDICTMENT**, 3.

**ALIEN.** — See **TAX**, 6; **VOTER**.

#### **ALIMONY.**

In suit for divorce brought by husband against wife, an order was made for payment to the wife of temporary alimony at a certain rate till the termination of the suit. Afterwards the suit was dismissed. *Held*, that the wife could not maintain a *scire facias* on the order against the husband, (1) because of coverture; (2) because evidence *dehors* the record would be required to show how much was due. — *Chestnut v. Chestnut*, 77 Ill. 346.

See **HUSBAND AND WIFE**, 2.

#### **APPEAL.**

On an indictment for felony, the prisoner was convicted and sentenced to be imprisoned, and to pay the costs of prosecution. He appealed, and, pending the appeal, died. *Held*, (1) that the appeal was abated; (2) that the judgment for costs remained in force; (3) that execution might issue thereon against his estate. — *Whitley v. Murphy*, 5 Oregon, 328.

See **JURISDICTION**; **VERDICT**.

**ARREST.** — See **CONTEMPT**.

**ARSON.** — See **INDICTMENT**, 2.

#### **ASSAULT.**

1. One is guilty of an assault and battery who delivers to another a thing to be eaten, knowing and concealing the fact that it contains a foreign substance, if the other, not knowing the fact, eats the food and is injured in health. — *Commonwealth v. Stratton*, 114 Mass. 303.

2. One who negligently drives over another is not guilty of a criminal assault and battery, though he does it while violating a city ordinance against fast driving. — *Commonwealth v. Adams*, 114 Mass. 323.

See **DAMAGES**, 2.

**ASSESSMENT.** — See **TAX**.

#### **ASSUMPSIT.**

Plaintiff agreed to work for defendant, according to a special contract; and defendant agreed to pay him by a conveyance of land. The work was done, but not according to the contract; but defendant took the benefit of it, and refused to convey the land. In assumpsit by the plaintiff, *held*, (1) that he could recover on the common counts; (2) that the measure of damages was the value of the land, less the sum required to complete the work according to the contract. — *Blakeslee v. Holt*, 42 Conn. 226.

See **DURESS**; **TAX**, 5.

**ATTACHMENT.** — See **BANKRUPTCY**, 1; **CONTEMPT**; **DURESS**; **FOREIGN ATTACHMENT**.

**ATTORNEY.** — See **FRAUDULENT PREFERENCE**, 2; **MALICIOUS PROSECUTION**, 1.

## AUCTION.

By-bidding at an auction sale, advertised "to be positive," of land in lots, will render the sale voidable by a purchaser influenced by such bidding, whether that bidding was upon the lot purchased by him or upon lots previously offered, even though it was instigated by the auctioneer without the seller's knowledge; but if it appears that he was not so influenced, the sale is valid. — *Curtis v. Aspinwall*, 114 Mass. 187.

BAIL. — See SURETY, 2.

BANK. — See NATIONAL BANK.

## BANKRUPTCY.

1. An attachment was levied on land of a debtor which afterwards became his homestead; after which, and within four months of the attachment, the debtor was adjudged bankrupt. *Held*, that the assignment in bankruptcy did not pass the land to the assignee, nor dissolve the attachment on it. — *Robinson v. Wilson*, 15 Kans. 595.

2. A creditor who has proved his debt in bankruptcy, without giving credit to the bankrupt for a claim against himself, cannot, if sued by the assignee for such claim, set off the debt which he has proved. — *Russell v. Owen*, 61 Mo. 185.

3. After dismissing proceedings in involuntary bankruptcy, the court has no jurisdiction to reinstate the cause without further process or notice to the bankrupt; and any proceedings had after such a reinstatement are void. — *Gage v. Gates*, 62 Mo. 412.

4. Under the Bankrupt Act of 1867, before any amendments, an assignee, without regard to the citizenship of the parties, might maintain a suit for the recovery of assets in a circuit court of the United States, in a district other than that in which the bankruptcy had been adjudged. — *Lathrop v. Drake*, 91 U. S. 516.

5. A mortgage may be foreclosed in a State court, after the mortgagor has been adjudged bankrupt; and the mortgagor's assignee is not a necessary party to the proceedings for foreclosure, though he may become a party if he will. — *Eyster v. Gaff*, 91 U. S. 521.

6. Proof in bankruptcy of a debt against a corporation and receipt of a dividend thereon, is no bar to an action to recover the balance. — *New Lamp Chimney Co. v. Ansonia Brass and Copper Co.*, 91 U. S. 656.

See CORPORATION, 2; FRAUDULENT PREFERENCE; JURISDICTION; TRUST.

BASTARD. — See DESCENT; VOTER.

BASTARDY. — See JUDGE, 1.

BATTERY. — See ASSAULT.

BETTERMENT. — See CONSTITUTIONAL LAW, STATE, 1; TAX, 4.

## BILL OF LADING.

An agent who receives "for collection," without further instructions, time-drafts attached to bills of lading of merchandise, deliverable to order, is justified in giving up the bills of lading to the drawer on acceptance by him of the drafts, and is not bound to hold them till the drafts are paid. — *National Bank of Commerce v. Merchants' Bank*, 91 U. S. 92.

## BILLS AND NOTES.

A written promise to pay to the order of a corporation a certain sum "in such instalments and at such times as the directors of said company may from time to time assess or require," *held* negotiable. — *White v. Smith*, 77 Ill. 351.

See BILL OF LADING; FORGERY; FRAUDULENT PREFERENCE, 1; INTEREST, 1, 2; PARTNERSHIP.

## BONA FIDE PURCHASER.

County bonds lawfully issued, with a blank left for the name of the payer, were stolen. *Held*, that they were valid and negotiable, and that a *bona fide* purchaser could hold them against the true owner. — *Boyd v. Kennedy*, 9 Vroom, 146.

See REGISTRY.

BOND. — See BONA FIDE PURCHASER; OFFICER, 2; SURETY, 1, 2.

BREACH OF PROMISE. — See ILLEGAL CONTRACT, 2.

## BRIBERY.

An information in the nature of *quo warranto* to declare void the election of a county officer, on the ground that he offered, before election, to pay part of his salary, if he should be chosen, into the county treasury, is bad, unless it shows affirmatively that voters influenced by such offer were tax-payers of the county, or would otherwise have been benefited by the performance of the promise. — *State v. Church*, 5 Oregon, 375.

BROKER. — See AGENT.

BURDEN OF PROOF. — See EVIDENCE, 1, 2.

CARRIER. — See DAMAGES, 2.

CASE STATED. — See VERDICT.

CATTLE. — See CONSTITUTIONAL LAW, STATE, 7.

## CHARITY.

A bequest to J. S. "to apply in charity according to his best discretion," is too indefinite to be supported as a charitable gift, and is void. — *Schmucker v. Reel*, 61 Mo. 592.

CHARTER. — See CONSTITUTIONAL LAW, 1; TAX, 1.

CHOSE IN ACTION. — See FRAUDS, STATUTE OF, 1; TAX, 2.

COMMON CARRIER. — See CARRIER.

COMMON COUNTS. — See ASSUMPSIT.

CONFLICT OF LAWS. — See FOREIGN JUDGMENT.

## CONSIDERATION.

There is no consideration for, and no action lies on, a father's promise to pay for goods which have been sold on credit to his infant child, without his order or consent. — *Freeman v. Robinson*, 9 Vroom, 383.

## CONSTITUTIONAL LAW.

1. A railroad company, by its charter, had power to regulate tolls. Afterwards a statute was passed, to regulate the same tolls. *Held* unconstitutional. *Sloan v. Pacific R.R.*, 61 Mo. 24.

2. A State statute, imposing a license-tax on peddlers of goods not the growth, produce, or manufacture of the State, *held* unconstitutional. — *Wellon v. Missouri*, 91 U. S. 275.

See EMINENT DOMAIN; INTEREST, 1; REPEAL; TAX, 6.

## CONSTITUTIONAL LAW, STATE.

1. A betterment law, allowing the benefit derived by a person from the laying out of a highway over his land to be set off against the damages due him for taking the land, *held* unconstitutional. — *Carpenter v. Jennings*, 77 Ill. 250.

2. A statute, making railroad companies liable for expenses of coroners' inquests on and burial of "all persons who may die on the cars, or who may be killed by collision or other accident occurring to such cars, or otherwise," *held* unconstitutional. — *Ohio & Miss. Ry. Co. v. Lackey*, 78 Ill. 55.

3. A statute purporting to confirm an order of the Probate Court for the sale of lands, which order was void because made on the petition of one who was not duly qualified as administrator, *held* unconstitutional. — *Pryor v. Downey*, 50 Cal. 388.

4. A statute united two cities, providing that the act should not take effect unless accepted by the voters of the cities. *Held* constitutional. — *Stone v. Charlestown*, 114 Mass. 214.

5. A statute, requiring the justices of the Supreme Judicial Court to appoint supervisors of elections, *held* unconstitutional. — *Case of Supervisors of Elections*, 114 Mass. 247.

6. When a prisoner becomes a witness for himself (as by statute he may), and testifies that he is not guilty, he waives his constitutional privilege as to criminating himself, and may be cross-examined as to every thing relevant to the issue. — *Commonwealth v. Nichols*, 114 Mass. 285.

7. An act, providing that it should be unlawful for cattle to run at large in any county where the inhabitants should vote to restrain them, *held* unconstitutional, as a delegation of legislative power. — *Lammert v. Lidwell*, 62 Mo. 188.

See GUARDIAN; OFFICER, 2.

CONSUL. — See JUDGE, 2.

## CONTEMPT.

A statutory exemption from arrest or imprisonment, by virtue of any mesne process, or process of execution in any civil action, does not apply to an attachment for contempt in not paying costs. — *Clark v. Grant*, 9 Vroom, 257.

## CONTRACT.

1. Action for breach of a contract to furnish plaintiff with board at defendant's house for a year. Plea, that at the time of making the contract, and

afterwards, plaintiff was infected with a contagious disease, to wit, syphilis, of which defendant had no notice at the time of making the contract, and which afterward, while plaintiff boarded at defendant's house, endangered the lives and health of defendant and his family, by reason whereof defendant refused longer to allow plaintiff to board at his house. *Held good.* — *Douglas v. McFadin*, 15 Kans. 336.

2. An action for breach of an agreement to purchase land, brought before the expiration of the time limited for the purchase, cannot be maintained by proof of an absolute refusal by the defendant ever to purchase. — *Daniels v. Newton*, 114 Mass. 530; *Nason v. Holt*, id. 541.

See ASSUMPSIT; AUCTION; CONSIDERATION; CORPORATION, 3; DAMAGES, 1, 3, 6; FRAUDS, STATUTE OF; ILLEGAL CONTRACT; INFANT; INSURANCE; INTEREST; PARTIES; PARTNERSHIP; RAILROAD; REPEAL; SALE; SURETY; VESTED INTEREST; WAGER.

#### CONTRIBUTORY NEGLIGENCE.

The owner of land adjoining a railroad track, who sues the railroad for negligence in setting a fire on his land by sparks from a locomotive, is not chargeable with contributory negligence by reason of neglect to clear his land of dead leaves, or other combustible matter, or to keep them from being carried by the wind on to the track. — *Salmon v. Delaware, Lack. & West. R.R. Co.*, 9 Vroom, 5.

CONVERSION. — See EXECUTOR, 2.

CONVERSION (EQUITABLE). — See TAX, 6.

#### CORPORATION.

1. Though the day and place of the annual meeting of a corporation are fixed by its by-laws, yet due notice must be given of the day, hour, and place of such meeting, or a choice of officers made at it will be unlawful. — *San Buenaventura Mfg. Co. v. Vassault*, 50 Cal. 534.

2. A bankrupt may vote on stock in a corporation standing in his name, with the assent of his assignee, and, *semble*, without such assent. — *State v. Ferris*, 42 Conn. 560.

3. Directors of a railway company became members of another company, with which they had made a contract for building the road. *Held*, that they were liable to account to the stockholders for profits thus realized by them. — *Gilman, Clinton, & Springfield R.R. Co. v. Kelly*, 77 Ill. 426.

See BANKRUPTCY, 6; CONSTITUTIONAL LAW, 1; DIVIDEND; NATIONAL BANK; RAILROAD; TAX, 1.

COSTS. — See APPEAL.

COURT. — See JUDGE, 2; JUDICIAL NOTICE, 1.

COVENANT. — See DAMAGES, 5.

CRIMINAL LAW. — See APPEAL; ASSAULT; CONSTITUTIONAL LAW, STATE, 6; EVIDENCE, 3; FORGERY; INDICTMENT; LARCENY; MURDER; NEW TRIAL; VERDICT.

CUSTOM. — See SALE, 1; USAGE.

## DAMAGES.

1. Plaintiff agreed to serve defendant for four months, at a certain rate per month. When the time came for the service to begin, defendant refused to employ plaintiff. *Held*, that plaintiff was not entitled to recover his four months' wages, but only the damages he had actually suffered. — *Putney v. Swift*, 54 Ga. 266.

2. A passenger, who had bought a ticket for a berth in a sleeping-car, lost it, and gave evidence to the conductor that he had done so, and refused to pay over again, whereupon the conductor, without violence, expelled him from the car, and he was compelled to ride in a common car. *Held*, that the owners of the sleeping-car were not liable in exemplary damages. — *Pullman Palace Car Co. v. Reed*, 75 Ill. 125.

3. In an action by the purchaser, for breach of a contract to convey land, the measure of damages is the value of the land at the time when the conveyance ought to have been made. — *Plummer v. Rigdon*, 78 Ill. 222.

4. Action to recover damages for driving against and breaking a vehicle. *Held*, that no damages were recoverable for loss of the use of the vehicle while repairing, under a declaration alleging that the plaintiff was compelled to expend a large sum for repairs, and that the vehicle became useless. — *Adams v. Gardner*, 78 Ill. 568.

5. Action on the covenant against incumbrances in a conveyance; breach, the existence of a railroad over the estate conveyed. *Held*, that no evidence, either that the value of the land was enhanced by reason of the railroad, or that the railroad did not use, and suffered the plaintiff to use, part of the land taken by it, was admissible in reduction of damages. — *Kellogg v. Malin*, 62 Mo. 429.

6. The seller of seed to be sown for a crop asserted that it would produce a crop of a certain kind. The truth of his assertion could not be ascertained by inspection of the seed; which, being sown, produced a different crop. *Held*, (1) that the seller's statement was a warranty, on which he was liable; (2) that the measure of damages was the difference in value between the crop produced and that which would have been produced if the seed had been what it was represented to be. — *Wolcott v. Mount*, 9 Vroom, 496.

7. Action by a judgment-creditor of a town against the supervisors of the town for refusing to place on the tax-list the amount of his judgment, which could by law be collected in no other way. At the trial, it was proved that, since action brought, the defendants had placed the judgment on the tax-list. *Held*, that the plaintiff could recover only nominal damages. (CLIFFORD, J., dissenting.) — *Dow v. Humbert*, 91 U. S. 294.

See ACTION, 1, 2; ASSUMPSIT; INTEREST, 1, 2; MALICIOUS PROSECUTION, 1.

DEATH. — See APPEAL; EVIDENCE, 6.

DEDICATION. — See ADVERSE POSSESSION.

## DEED.

1. A commissioner was appointed by decree of a court to convey land to J. S. He did nothing in the matter for thirty years, when he conveyed the

land to the assignee of J. S. *Held*, that the conveyance was void, as well on the ground of lapse of time as because it did not pursue the decree. — *Schrader v. Peach*, 77 Ill. 615.

2. The deed of a disseisee is valid against every one but the disseisor and his privies. — *McMahan v. Bowe*, 114 Mass. 143.

See BONA FIDE PURCHASER; REGISTRY.

DE INJURIA. — See TRAVERSE.

DELIVERY. — See DONATIO CAUSA MORTIS; SALE, 1, 3.

DEPOSIT. — See TAX, 7.

#### DESCENT.

By the law of Connecticut, the child of a bastard may derive through him a title by descent as well from his collateral as from his lineal ancestors. — *Dickinson's Appeal*, 42 Conn. 491.

DEVISE AND LEGACY. — See CHARITY; EVIDENCE, 5; TAX, 6; WILL.

DIRECTOR. — See CORPORATION, 3.

DISSEISIN. — See DEED, 2.

#### DIVIDEND.

The directors of a corporation declared a dividend, to be paid at such time as might be fixed by them, and ordered the amounts due the several stockholders to be placed to their respective credit on the books of the company. Afterwards the directors voted to take the dividends from the accounts of the stockholders, and carry them to a "surplus fund account." *Held*, that stockholders not assenting to this vote were not bound by it, and might maintain a bill in equity to have the dividends restored to their accounts, and paid to them within a reasonable time. — *Beers v. Bridgeport Spring Co.*, 42 Conn. 17.

DIVORCE. — See ALIMONY; HUSBAND AND WIFE, 2; JUDGMENT, 1.

#### DONATIO CAUSA MORTIS.

The taking the key of a trunk from the place where it is kept, and the putting goods into the trunk, and the returning the key to its place, at the request of the owner in his last sickness, apprehending death and expressing the desire to make a gift of the trunk and its contents *mortis causa*, is not a delivery sufficient for that purpose. — *Coleman v. Parker*, 114 Mass. 30.

DUPPLICITY. — See INDICTMENT, 2.

#### DURESS.

A payment by a person to free his goods from an attachment, put on for the purpose of extorting money, by one who knows that he has no cause of action, is a payment under duress, and may be recovered back as money had and received, without proof of the termination of the suit in which the attachment was made. — *Chandler v. Sanger*, 114 Mass. 364.

See OFFICER, 2.

## EASEMENT.

1. The owner of two adjacent lots of land put up on one of them a building, whose wall stood on the division line between the lots, and had on its outside, projecting over the second lot, a flue and chimney for the use of a furnace in the house. The lot built on was afterwards sold to plaintiff, and the other to defendant, who built on it, and paid half the expense of the party-wall. *Held*, that he purchased subject to an easement, and had no right to obstruct the flue. — *Ingals v. Plamondon*, 75 Ill. 118.

2. On a conveyance of land, separated from a highway by other land of the grantor, the grantee has not a right of way of necessity over such other land, if the land conveyed is not wholly surrounded by land of the grantor. — *Kuhlman v. Hecht*, 77 Ill. 570.

See DAMAGES, 5.

ELECTION. — See BRIBERY; CONSTITUTIONAL LAW, STATE, 4, 5, 7.

## EMINENT DOMAIN.

The United States government has power to take private property within a State for public uses, without the owner's consent. — *Kohl v. United States*, 91 U. S. 387.

See CONSTITUTIONAL LAW, STATE, 1.

EQUITY. — See FALSE REPRESENTATIONS; HUSBAND AND WIFE, 2; INJUNCTION; MISTAKE; OFFICER, 1; SCHOOL; TAX, 7.

ERROR. — See REMOVAL OF SUITS.

ESTOPPEL. — See TAX, 6.

## EVIDENCE.

1. Action for slander by words charging larceny. Plea, that the words were true. *Held*, that the plea could not avail, unless proved beyond a reasonable doubt. — *Merk v. Gelzhaueser*, 50 Cal. 631.

2. Action on a policy of fire insurance. Defence, that the burning was by design and procurement of the plaintiff. *Held*, that this defence could not avail, unless proved beyond a reasonable doubt. — *Kane v. Hibernia Mut. F. Ins. Co.*, 9 Vroom, 441. But see *Rothschild v. Am. Central Ins. Co.*, 62 Mo. 356, *contra*.

3. The evidence of an accomplice cannot be considered as corroborated by that of another, unless it appears that they have had no opportunity to communicate with each other. — *State v. Williamson*, 42 Conn. 261.

4. Parol evidence is not admissible to impeach a record of naturalization by showing that the preliminary steps required by law were not taken. — *People v. McGowan*, 77 Ill. 644.

5. Parol evidence is admissible to show that a devise absolute on its face was in fact made on a secret trust to defraud the mortmain laws. — *Kenrick v. Cole*, 61 Mo. 572.

6. Action on a policy of insurance on the life of J. S., brought by the plaintiff in his own right, and not as administrator. *Held*, that a grant of ad-



ministration on the estate of J. S. was no evidence that he was dead. — *Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S. 238.

See CONSTITUTIONAL LAW, STATE, 6; CONTRACT, 2; DAMAGES, 5; JUDICIAL NOTICE; MALICIOUS PROSECUTION, 1, 2; REVOCATION; SALE, 1; USAGE; WILL; WITNESS.

#### EXECUTOR AND ADMINISTRATOR.

1. The estate of a deceased person is not liable for the expenses of a *post mortem* examination ordered by a coroner. — *Smith v. McLaughlin*, 77 Ill. 596.

2. One who, as a widow's agent, in good faith, sells perishable property of her deceased husband, and accounts for the proceeds, is not liable as executor *de son tort* to an administrator afterwards appointed. — *Perkins v. Ladd*, 114 Mass. 420.

See EVIDENCE, 6; MORTGAGE, 1.

EXEMPTION. — See BANKRUPTCY, 1; TAX, 1, 3.

FACTOR. — See AGENT.

#### FALSE REPRESENTATIONS.

Bill in equity, averring that plaintiffs were makers of goods of a patented material; that defendants, being makers of like goods of a material not patented, falsely, fraudulently, and maliciously represented to plaintiffs' customers, that plaintiffs' manufacture was an infringement of letters-patent owned by defendants, whereby such customers were induced to buy of defendants, instead of plaintiffs. Prayer for injunction and account. Demurrer for want of equity sustained. — *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69. [See *Prudential Assurance Co. v. Knott*, L. R. 10 Ch. 142; *Whitehead v. Kison*, 119 Mass. 484, acc.]

FIRE. — See CONTRIBUTORY NEGLIGENCE.

FIRE INSURANCE. — See INSURANCE (FIRE).

#### FIXTURE.

A landlord agreed to sell a trade fixture, for the tenant's benefit, but failed to do so. *Held*, that the tenant might enter and remove the fixture within a reasonable time after the expiration of his term. — *Torrey v. Bennett*, 9 Vroom, 457.

FORECLOSURE. — See BANKRUPTCY, 5.

#### FOREIGN ATTACHMENT.

1. The salary due a public-school teacher, or other officer employed and paid by a city, is not attachable by trustee process against him, in the hands of the city officials whose duty is to pay it. — *Hightower v. Slaton*, 54 Ga. 108; *McLellan v. Young*, id. 399.

2. A debtor to a partnership, of which A. is a member, is not liable as garnishee in an action against A. alone. — *Sheedy v. Second Nat. Bank*, 62 Mo. 1.

3. A municipal corporation may be summoned as garnishee. — *Mayor, &c. of Jersey City v. Horton*, 9 Vroom, 88.

## FOREIGN JUDGMENT.

Two were sued as partners, after a dissolution. An appearance was entered for both, and the plaintiff recovered. One of the defendants was resident in another State, and had no actual notice of the action. *Held*, that the other defendant had no authority to appear for him, that the court had no jurisdiction of him, and that he was not bound by the judgment, nor liable in an action brought on it in the State where he resided. (WAITE, C. J., STRONG, and HUNT, JJ., dissenting.) — *Hall v. Lansing*, 91 U. S. 180.

FOREIGN LAW. — See JUDGE, 2.

## FORGERY.

One who, with intent fraudulently to utter a promissory note as the note of a person other than the signer, procures to it the signature of an innocent party, who does not thereby intend to bind himself, is guilty of forgery. — *Commonwealth v. Foster*, 114 Mass. 311.

FRAUD. — See FALSE REPRESENTATIONS.

## FRAUDS, STATUTE OF.

1. When accounts are transferable by law, a contract to buy one worth more than \$50 is within the Statute. — *Walker v. Supple*, 54 Ga. 178.

2. One who had agreed to buy land, learning that there was an assessment on it, refused to complete his purchase unless the vendor would pay the assessment; but accepted a deed and paid the purchase-money on the vendor's promising to pay the assessment. *Held*, that this promise was not within the Statute. — *Remington v. Palmer*, 62 N. Y. 31.

3. An agreement to render services, to be paid for after the employer's death, is not within the Statute as an agreement not to be performed within a year. — *Kent v. Kent*, 62 N. Y. 560.

## FRAUDULENT PREFERENCE.

1. If a bankrupt gives to a creditor his note indorsed by a third person, this is not a fraudulent preference, as the advantage secured by the creditor is not out of the bankrupt's estate. — *Dalrymple v. Hillebrand*, 62 N. Y. 5.

2. A creditor put his claim into the hands of a collection agency, by whom it was transmitted to an attorney, who, knowing the debtor's insolvency, persuaded him to confess judgment. Within four months after, the debtor became bankrupt. The money collected on the judgment was sent to the collection agency, but never reached the creditor. *Held*, that the creditor was not affected with notice of the debtor's insolvency, so as to be liable to his assignee for the money collected. (CLIFFORD, MILLER, and BRADLEY, JJ., dissenting.) — *Hoover v. Wise*, 91 U. S. 308.

GARNISHMENT. — See FOREIGN ATTACHMENT.

GIFT. — See DONATIO CAUSA MORTIS.

## GUARDIAN.

A statute authorized J. S., as guardian of an infant, to sell the infant's land, subject to the approval of the Probate Court. *Held*, that the statute did

not appoint J. S. to be guardian (and *quære*, if it could constitutionally do so), but that he must be appointed guardian by a court, according to the general law, before he could exercise the power given by the statute. — *Paty v. Smith*, 50 Cal. 153.

HEIR. — See DESCENT; WARRANTY.

HOMESTEAD. — See BANKRUPTCY, 1.

HOMICIDE. — See MURDER.

#### HUSBAND AND WIFE.

1. A husband assaulted his wife, disabling her from work. He was convicted of the assault, and imprisoned, leaving the wife destitute. *Held*, that she might sell his property for money with which to procure necessities. — *Ahern v. Easterby*, 42 Conn. 546.

2. A bill in equity by wife against husband for a separate maintenance is not sustainable when no divorce is sought. — *Trotter v. Trotter*, 77 Ill. 510.

See ALIMONY; ILLEGAL CONTRACT, 2; JUDGMENT, 1; LIMITATIONS, STATUTE OF, 2.

#### ILLEGAL CONTRACT.

1. A contract was made for the sale of land, and the purchaser gave to a stakeholder his check for the price, the parties agreeing, that, if a certain act for laying out a public park should be accepted by the people, the check should be transferred to the vendor; but that if the act should not be accepted, the contract should be void, and the check returned to the purchaser. The act was accepted. *Held*, that the contract was void on grounds of public policy, and that the vendor could maintain no action against the stakeholder, who refused, under the purchaser's instructions, to give up the check. — *Merchants' Savings Co. v. Goodrich*, 75 Ill. 554.

2. An agreement of a married man to marry, when a divorce should be decreed between himself and his wife in a suit then pending, is contrary to public policy, and void, and no action lies for its breach. — *Noice v. Brown*, 9 Vroom, 228.

See BRIBERY; SALE, 3; WAGER.

IMPLIED GRANT. — See EASEMENT, 1, 2.

IMPRISONMENT. — See CONTEMPT.

INCUMBRANCE. — See DAMAGES, 5.

#### INDICTMENT.

1. Indictment under a statute for burning goods with intent to defraud the insurers. A second count charged the same offence, naming other insurers. The evidence was, that the burning was a single act, but that the goods burnt were insured by the insurers named in the second count, as well as by those named in the first count. *Held*, that the prisoner could be convicted on one count only. — *Commonwealth v. Goldstein*, 114 Mass. 272.

2. Indictment for arson, charging as a single act the burning of several houses, *held* to charge but one offence, and not to be double. — *Woodford v. People*, 62 N. Y. 117.

3. Indictment for voting at an election, the prisoner "having no lawful right to vote, and knowing himself not entitled by law to vote," not showing how he was disqualified. *Held* good after verdict; otherwise, if it had been demurred to. — *State v. Bruce*, 5 Oregon, 68.

INDORSEMENT. — See FRAUDULENT PREFERENCE, 1.

#### INFANT.

An infant is not liable for necessities furnished him, merely because his father is poor and unable himself to pay for them. — *Hoyt v. Casey*, 114 Mass. 397.

See CONSIDERATION; LIMITATIONS, STATUTE OF, 1.

#### INJUNCTION.

Certain municipal bonds irregularly issued were held by the State courts to be void, even in the hands of *bona fide* holders, while the United States courts held otherwise. The obligors filed a bill in a State court to enjoin holders of such bonds from transferring them to *bona fide* holders who might sue in the United States courts. *Held*, that the bill was not maintainable, at least in the absence of proof that the defendants were not themselves *bona fide* holders. — *Venice v. Woodruff*, 62 N. Y. 462.

See NATIONAL BANK, 1; OFFICER, 1; SCHOOL; TAX, 7.

#### INSURANCE (FIRE).

1. A debtor gave to his creditor a written acknowledgment of the debt, "which shall be a lien on my property," and afterwards died, leaving insufficient personal estate to pay his other debts, and but one parcel of land, valuable chiefly for the buildings thereon. *Held*, that the creditor had an insurable interest in the buildings. — *Rohrbach v. Germania F. Ins. Co.*, 62 N. Y. 47.

2. When a mortgagor procures insurance against fire by a policy expressed to be payable to the mortgagee in case of loss, either he or the mortgagee may sue on the policy. — *Martin v. Franklin Ins. Co.*, 9 Vroom, 140; *State Ins. Co. v. Maackens*, id. 564.

See EVIDENCE, 2; INDICTMENT, 1; JUDGMENT, 3; MISTAKE.

INSURANCE (LIFE). — See EVIDENCE, 6; PARTIES; VESTED INTEREST.

INSURANCE (MARINE). — See JUDGMENT, 3; MISTAKE.

#### INTEREST.

1. A promissory note by its terms bore interest at fifteen per cent after maturity. After the making of the note and before its maturity, a statute provided that not more than seven per cent interest should be recovered on any loan after maturity. In an action on the note, *held*, (1) that the provision for interest was part of the contract, and not a penalty or damages; (2) that the statute was not intended to apply to cases where a rate of interest after maturity was expressly agreed on; (3) that, if so intended, it was unconstitutional as to contracts made before its passage. (PARK, C. J., and CARPENTER, J., dissenting.) — *Hubbard v. Callahan*, 42 Conn. 524.

2. In an action on a promissory note, bearing interest at a rate greater than

that established by statute for cases where there is no special agreement, interest after maturity is to be allowed according to the statutory rate only. — *First Eccl. Soc. in Suffield v. Loomis*, 42 Conn. 570.

See NATIONAL BANK, 2; REPEAL.

INTERNAL REVENUE. — See AGENT; SALE, 8; TAX, 6.

#### JUDGE.

1. In a bastardy process, the complainant is a party; and, therefore, a justice who is related to her in the third degree cannot act in making an order of affiliation. — *State v. Overseer of Walpack*, 9 Vroom, 200.

2. United States consuls in Turkey have, by treaty and by act of Congress, jurisdiction in civil cases wherein the same is permitted by the laws or usages of Turkey. In an action against a consul, he pleaded that the act complained of was done by him in his judicial capacity. *Held*, that this justification was not good, without showing what were the laws or usages of Turkey giving jurisdiction in the particular case. — *Dainese v. Hale*, 91 U. S. 13.

See CONSTITUTIONAL LAW, STATE, 5.

#### JUDGMENT.

1. A statute provided that the defendant in a suit wherein notice had been given by publication, who has had no actual notice of the suit, may be let in to open the judgment against him, and defend, at any time within three years after judgment. *Held*, that the act was not applicable to causes of divorce. — *Lewis v. Lewis*, 15 Kans. 181.

2. By the law of Kansas, a judgment is a lien on after-acquired lands of the debtor. — *Babcock v. Jones*, 15 Kans. 296.

3. Reinsurers, by whose advice and for whose benefit the original insurers have defended an action brought by the assured, are liable to the insurers for the costs and expenses of such defence, and bound by the judgment, though they were not parties to the action. — *Strong v. Phoenix Ins. Co.*, 62 Mo. 289.

See APPEAL; CONSTITUTIONAL LAW, STATE, 3; DAMAGES, 7; DEED, 1; EVIDENCE, 6; FOREIGN JUDGMENT; MISNOMER; VERDICT.

#### JUDICIAL NOTICE.

1. The courts of a State will take judicial notice of the constitution of another State, so far as relates to the jurisdiction of the courts of such other State. (VALENTINE, J., dissenting.) — *Dodge v. Coffin*, 15 Kans. 277.

2. In a suit involving the validity of a patent for preserving fish and other articles by means of a freezing-mixture, the court took judicial notice, without plea or proof, that the principle of the invention was the same as that of the common ice-cream freezer. — *Brown v. Piper*, 91 U. S. 37.

#### JURISDICTION.

In a suit brought in a State court by receivers of an insolvent company appointed by that court, to recover property of the company, the defendants pleaded that the company was bankrupt, and that the title to its property was in its assignees (who were not parties to the suit, and under whom the defendants did not claim), and not in the plaintiffs. A decree was made

for the plaintiffs. *Held*, that the United States Supreme Court had not jurisdiction of an appeal from that decree. — *Long v. Converse*, 91 U. S. 105.

See BANKRUPTCY, 3, 4, 5; FOREIGN JUDGMENT; JUDICIAL NOTICE, 1.

JURY. — See NEW TRIAL.

#### LANDLORD AND TENANT.

Defendants leased to plaintiff the lower story of a building of which they occupied the upper story. They employed a carpenter to put a skylight on the roof, which he did so negligently that the rain came through and damaged plaintiff's goods. *Held*, that defendants were liable. — *Glickauf v. Maurer*, 75 Ill. 289.

See FIXTURE.

#### LARCENY.

The prisoner ran away with a horse, without its owner's knowledge or consent, and with no intention of returning it, and afterwards abandoned it in the road. *Held*, larceny. — *State v. Davis*, 9 Vroom, 176.

LEGACY. — See DEVISE.

LICENSE. — See CONSTITUTIONAL LAW, 2.

LIEN. — See INSURANCE (FIRE), 1; JUDGMENT, 2.

#### LIMITATIONS, STATUTE OF.

1. The Statute of Limitations allowed to infants a period of three years after arriving at full age (of twenty-one) in which to bring actions accrued during infancy. A later statute enacted that women should be considered of full age for all purposes at eighteen. An action was brought, within three years after the latter statute, by a woman who was then more than twenty-one years old, but had not reached that age before the passage of the statute. *Held* in time. — *Reisse v. Clarenbach*, 61 Mo. 310.

2. Husband and wife, jointly seised in her right, after issue born are dis-seised; the time limited by law for bringing a real action elapses; the husband dies; the wife shall be barred. (HOUGH, J., dissenting.) — *Valle v. Obenhause*, 62 Mo. 81.

#### MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, the defendant offered evidence to show that he acted under the advice of a person whom he believed, and who professed himself, to be a duly licensed attorney, though not such in fact. *Held*, that the evidence was not admissible in bar of the action, or in reduction of actual damages, but only to rebut malice, and mitigate exemplary damages. — *Murphy v. Larson*, 77 Ill. 172.

2. Action for malicious prosecution. The plaintiff had made an assault on W., from the effects of which he died; and it was for this that the defendant prosecuted. *Held*, that there was *prima facie* evidence of probable cause for the prosecution, though the assault was in fact justifiable. — *Glaze v. Whitley*, 5 Oregon, 164.

See DURESS.

MANDAMUS. — See REMOVAL OF SUITS.

MARRIAGE. — See ILLEGAL CONTRACT, 2.

#### MASTER AND SERVANT.

A street-car belonging to defendants was stopped so as to obstruct the street; plaintiff, a foot-passenger, wishing to cross the street, stepped upon the platform of the car in order to do so, and was thrown off by the driver, and hurt. On demurrer to a declaration averring these facts, and that the driver acted "wilfully, forcibly, and violently," and was the servant and agent of defendants, *held* that plaintiff was entitled to judgment. — *Shea v. Sixth Ave. R.R. Co.*, 62 N. Y. 180.

See DAMAGES, 1; LANDLORD AND TENANT; MUNICIPAL CORPORATION, 2, 3.

MEASURE OF DAMAGES. — See DAMAGES.

#### MISNOMER.

A defendant, sued by a fictitious name, appeared, and judgment was recovered against him, without any amendment of the complaint, by inserting his true name, as the law required. *Held*, that the judgment, though erroneous, was not void, and could not be impeached in a collateral proceeding. — *Campbell v. Adams*, 50 Cal. 203; *Baldwin v. Morgan*, *id.* 585.

#### MISTAKE.

Plaintiff filed a bill in equity to reform a policy of insurance, on the ground of mistake, by striking out a clause of warranty; and afterwards sued at law on the policy as written, averring compliance with the warranty, which defendants denied. After verdict and judgment for defendants on that issue, *held* that plaintiff had elected his remedy, and waived his right to prosecute further his bill in equity. — *Washburn v. Great Western Ins. Co.*, 114 Mass. 175.

MONEY HAD AND RECEIVED. — See DURESS; TAX, 5.

#### MORTGAGE.

1. A creditor may exercise a power of sale in a deed of trust made to secure payment of the debt, though the debtor died before any default, and no claim has been made against his estate, such as would be required by law before an action to recover the debt could be brought against the executor. — *Whitmore v. San Francisco Savings Union*, 50 Cal. 145.

2. A deed of trust was made with power of sale on default, after giving notice for five days, the last to be ten days before the sale. The last day of notice actually given was the eleventh before the sale. *Held*, that the power was well executed. — *Tooke v. Newman*, 75 Ill. 215.

See BANKRUPTCY, 5; INSURANCE (FIRE), 2; NATIONAL BANK, 1.

MORTMAIN. — See EVIDENCE, 5.

#### MUNICIPAL CORPORATION.

1. A town cannot raise by taxation, or pay from its treasury, money for expenses incurred in opposing before the Legislature the annexation of the

whole or part of its territory to another town. — *Coolidge v. Brookline*, 114 Mass. 592.

2. Commissioners of public charities, though appointed by the mayor of a city, *held* not to be servants of the city in such a sense as to make it liable for their negligence while using its property in the discharge of their duties. — *Mazmilian v. New York*, 62 N. Y. 160.

3. The entire control of streets in the District of Columbia is vested by charter, creating the district a municipal corporation, in a board of public works, appointed by the President of the United States. *Held*, that the District was liable for injuries caused by defects in the streets. (SWAYNE, FIELD, STRONG, and BRADLEY, JJ., dissenting.) — *Barnes v. District of Columbia*, 91 U. S. 540.

See CONSTITUTIONAL LAW, STATE, 4; FOREIGN ATTACHMENT.

#### MURDER.

A husband finding his wife in the act of adultery struck her, with intent to kill her, and she died from the effect of the blow. On his trial for her murder, *held* that the provocation did not necessarily, as matter of law, reduce the offence to manslaughter. — *Shufflin v. People*, 62 N. Y. 229.

NAME. — See MISNOMER.

#### NATIONAL BANK.

1. A national bank has no power to lend money on real security. Therefore, where such a bank had lent money, taking as security an assignment of a mortgage, it was *held*, on bill filed by the mortgagor, that a sale under a power in the mortgage should be enjoined. — *Matthews v. Skinker*, 62 Mo. 329.

2. National banks, organized under act of Congress, are not subject to the usury laws of the States in which they are established. — *Farmers' Bank v. Dearing*, 91 U. S. 29.

NATURALIZATION. — See EVIDENCE, 4; VOTER.

NECESSARIES. — See HUSBAND AND WIFE, 1; INFANT.

NEGLECTANCE. — See ASSAULT, 2; CONTRIBUTORY NEGLIGENCE; LANDLORD AND TENANT; MUNICIPAL CORPORATION, 2, 3.

NEGOTIABLE INSTRUMENTS. — See BILLS AND NOTES; BONA FIDE PURCHASER.

#### NEW TRIAL.

If a juror in a criminal case is accepted without examination on the *voir dire*, the verdict will not be set aside on the ground that he had expressed an opinion before the trial. — *Byars v. Mount Vernon*, 77 Ill. 467.

NOTICE. — See CORPORATION, 1; MORTGAGE, 2; REGISTRY.

#### NUISANCE.

One who owns a steam-boiler, and uses it on his own land, is not liable, in the absence of negligence, for damage caused by its explosion to property on adjoining land. — *Marshall v. Welwood*, 9 Vroom, 339.



## OFFICER.

1. A city officer appointed by the mayor and aldermen cannot maintain a bill in equity to enjoin them from unlawfully removing him or appointing a successor; for he has a complete remedy at law. — *Delahanty v. Warner*, 75 Ill. 185.

2. A State treasurer, who had given the official bond required by law, held office, by force of the Constitution, after his term had expired, till his successor should be qualified. While he so held, the Legislature enacted that "the treasurer shall, before entering on the duties of his office, give bond in" a larger sum than the law had before required; and the treasurer gave a new bond accordingly. *Held*, (1) that the statute was not intended to require a new bond of him; (2) that, if it was so intended, it was *ultra vires* of the Legislature; (3) that therefore the new bond given by him was voluntary, and not made under duress, and valid, though not required by law. — *Sooy v. State*, 9 Vroom, 324.

See BRIBERY; FOREIGN ATTACHMENT, 1; SURETY, 1.

PARENT. — See CONSIDERATION; INFANT.

## PARTIES.

An action on a policy of life insurance, by its terms payable to the assured, his executors, administrators, and assigns, is not maintainable in the name of one for whose benefit the policy is expressed to be made. — *Bailey v. New England Ins. Co.*, 114 Mass. 177.

See BANKRUPTCY, 5; INSURANCE (FIRE), 2; JUDGE, 1.

## PARTNERSHIP.

A partnership between a resident of New York and residents of Louisiana was not dissolved by the war as early as April 23, 1861; and the acceptance by the firm on that day of a bill of exchange binds all the partners. — *Matthews v. McStea*, 91 U. S. 7.

See FOREIGN ATTACHMENT, 2; FOREIGN JUDGMENT.

PASSENGER. — See DAMAGES, 2.

PATENT. — See JUDICIAL NOTICE, 2.

PEDDLER. — See CONSTITUTIONAL LAW, 2.

PENALTY. — See INTEREST, 1.

PLEADING. — See BRIBERY; DAMAGES, 4; JUDGE, 2; TRAVERSE.

POWER. — See DEED, 1; MORTGAGE, 1, 2.

PREROGATIVE. — See EMINENT DOMAIN.

PRINCIPAL AND AGENT. — See AGENT.

PRINCIPAL AND SURETY. — See SURETY.

PROMISSORY NOTE. — See BILLS AND NOTES.

PUBLIC POLICY. — See ILLEGAL CONTRACT.

QUO WARRANTO. — See BRIBERY.

## RAILROAD.

The sale, for one sum, of a railroad ticket, composed of coupons invalid if detached, and each bearing the name of the railroad corporation selling it, empowering the purchaser to pass over the connecting roads of different corporations, does not make the selling corporation liable to the purchaser for an injury received on a connecting road. — *Hartan v. Eastern R.R. Co.*, 114 Mass. 44.

See CONSTITUTIONAL LAW, 1; CONSTITUTIONAL LAW, STATE, 2; CONTRIBUTORY NEGLIGENCE; CORPORATION, 3; DAMAGES, 2; MASTER AND SERVANT.

RECORD. — See EVIDENCE, 4.

## REGISTRY.

A deed actually recorded, though not entitled to record, is not constructive notice to a subsequent grantee; but if he has in fact seen the record, he is affected with actual notice. — *Musgrove v. Bonser*, 5 Oregon, 313.

REINSURANCE. — See JUDGMENT, 3.

## REMOVAL OF SUITS FROM STATE TO UNITED STATES COURTS.

By the judgment of a circuit court of the United States a cause removed into that court from a State court was remanded to the latter, on the ground that the former had no jurisdiction. *Held*, that no writ of error could be brought on such judgment, but that the remedy was by *mandamus*. — *Chicago & Alton R.R. Co. v. Wiswall*, 23 Wall. 507.

## REPEAL.

A statute confirming and making valid usurious contracts theretofore made was repealed. *Held*, that a contract made before, and confirmed by, the statute, was enforceable, notwithstanding the repeal. (PARK, C. J., and LOOMIS, J., dissenting.) — *First Eccl. Soc. of Suffield v. Loomis*, 42 Conn. 570.

See TAX, 1.

REPLICATION. — See TRAVERSE.

## REVOCATION.

Though a will is lost, and its contents cannot be sufficiently proved to admit it to probate, yet if it can be proved to have been duly executed, and to have contained a clause revoking a prior will, probate of such prior will is not to be granted. — *Wallis v. Wallis*, 114 Mass. 510.

## SALE.

1. Flax-seed was sold by sample; and an order on the carrier, in whose possession it was, for its delivery, was handed with the sample to the purchaser. *Held*, that the title was vested in him presently; that, on the seed being afterwards destroyed by fire, the loss fell on him; and that he could not rely on a usage that purchasers in such cases should have twenty-four hours in which to examine the goods, such usage being bad in law. — *Webster v. Gran-ger*, 78 Ill. 230.

2. The owner of growing corn agreed to sell two thousand bushels of it when ripe for a certain price, the purchaser to give ten days' notice before calling for it. *Held*, that, on his failing to give notice within a reasonable time, the seller might tender the corn, and sue the purchaser for not accepting it; and that the seller was not bound to carry the corn with him to tender, if he had it ready for delivery. — *Sanborn v. Benedict*, 78 Ill. 309.

3. All the cigars in a factory were sold, and paid for. The seller went to the factory with the purchaser, and said to him, "Here are your cigars." The purchaser bought the revenue stamps required by law to be affixed to cigars before sale, and left the cigars in the factory to be stamped by the seller's servants; and while so remaining in the factory they were attached as the seller's property. *Held*, (1) that the sale was legal, though made before affixing the stamps; (2) that there was a sufficient delivery to vest the title in the purchaser, as against the attaching creditor. — *Straus v. Minzesheimer*, 78 Ill. 492.

See AUCTION; BONA FIDE PURCHASER; DAMAGES, 3, 6; FRAUDS, STATUTE OF, 1, 2; USAGE.

#### SCHOOL.

The use of a public-school house for other than school purposes is unlawful, and any tax-payer of the school district may maintain a bill for an injunction to restrain such use. — *Spencer v. School District*, 15 Kans. 259.

SCIRE FACIAS. — See ALIMONY.

SET-OFF. — See BANKRUPTCY, 2.

SEWER. — See TAX, 4.

SLANDER. — See EVIDENCE, 1.

STAMP. — See SALE, 3.

STATUTE. — See CONSTITUTIONAL LAW; CONSTITUTIONAL LAW, STATE; GUARDIAN; INTEREST, 1; OFFICER, 2; REPEAL; TAX, 1.

STATUTE OF FRAUDS. — See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. — See LIMITATIONS, STATUTE OF.

STOCK. — See CORPORATION, 2.

SUCCESSION DUTY. — See TAX, 6.

SUPREME COURT OF THE UNITED STATES. — See JURISDICTION.

#### SURETY.

1. A town officer, who had given a bond with sureties for the discharge of his duties, accounted with the town when his term of office expired; and the account, showing a balance due from him, was approved by the town. He was re-elected; and gave a new bond, with new sureties. *Held*, that the latter were liable on his failure to account, at the end of his second term, for the balance due at its beginning. — *Morley v. Metamora*, 78 Ill. 394.

2. One who had applied for the benefit of a State insolvent law gave a bond, with sureties, conditioned to surrender himself to the sheriff if his discharge should be refused. The discharge was refused; and the insolvent being then in custody of the sheriff at the county jail, and about to be removed to the State prison, to which he had been sentenced on conviction of a crime, did not

surrender himself under the bond. *Held*, that the sureties were liable. — *Steelman v. Mattiz*, 9 Vroom, 247.

#### TAX.

1. The charter of a canal company, incorporated in 1823, exempted the company's stock and income from taxation for ever. Afterwards, the company being insolvent, all its franchises, privileges, and immunities were vested in another company, by charter, containing a proviso that the Legislature might alter or repeal it. An amendment to the latter charter authorized the company to discontinue the canal, increase its capital, and build a railroad, and provided that "the capital stock hereby created shall be taxed." *Held*, (1) that the exemption enjoyed by the first company passed to the second; (2) that it was not repealed by the amendment to the charter, which only applied to the new stock, (3) nor by a general law taxing all companies, except such as by their charters were expressly exempt. (CARPENTER and PHELPS, JJ., dissenting.) — *Nichols v. New Haven & Northampton Co.*, 42 Conn. 103.

2. The Legislature has power to tax residents of the State on debts due to them from non-residents, secured by mortgage of lands without the State. (FOSTER, J., dissenting.) — *Kirtland v. Hotchkiss*, 42 Conn. 426.

3. Property was "exempted" by statute "from taxation for ten years from and after the 1st of December, 1859." *Held*, that the property was exempt from taxes for 1860, due and payable after said 1st December, though assessed before; and consequently was liable to taxes for 1870, assessed before Dec. 1, 1869, but not payable till after that date. — *Southern Hotel Co. v. St. Louis County Court*, 62 Mo. 134.

4. By statute, commissioners of sewers were authorized to assess the cost of sewers on lands benefited thereby, in such proportions as they should think just and equitable. *Held*, that no valid assessment could be laid under the statute for want of any rule by which it might be apportioned. — *State v. Commissioners of Streets*, 9 Vroom, 190.

5. Where an assessment has been set aside by a court, one who has paid it, though voluntarily, may maintain an action to recover it back. — *Mayor, &c. of Jersey City v. Riker*, 9 Vroom, 225.

6. Personal estate was given by will to A. and others in common. The executors, with the assent of A., invested part of the estate in land; afterwards A. died, and by will gave all her share in the estate to B., an alien. The executors settled their accounts, and divided the whole estate among those entitled, B. receiving all his share in personalty. The United States claimed of him a "succession tax" in respect of that part of A.'s estate which was invested in land. *Held*, (1) that such tax was not a "direct tax" within the meaning of the Constitution, and therefore that the law imposing it was constitutional; (2) that B. was liable to the tax, although the property was converted from real to personal before he actually received it; (3) that, having received the equivalent of the real estate, he was estopped to say that the devise of it to him was void, by reason of alienage. — *Scholey v. Rew*, 23 Wall. 331.

7. By the law of Kansas, property is taxable to the person who holds it on the 1st of March. A resident of that State, having a large balance at a bank, on Feb. 28 drew it all out in legal-tender notes, exempt from taxation, re-

turned the notes in a sealed parcel to the bank as a special deposit, and on March 3 took them out again and deposited them on his current account. Being taxed on the deposit, he filed his bill for an injunction to restrain the collection of the tax. *Held*, that equity would not aid him; *quære*, whether he had a remedy at law. — *Mitchell v. Commissioners of Leavenworth County*, 91 U. S. 206.

See AGENT; CONSTITUTIONAL LAW, 2; FRAUDS, STATUTE OF, 2; MUNICIPAL CORPORATION, 1; SALE, 3.

TENDER. — See SALE, 2.

#### TRAVERSE.

Assumpsit by a corporation to recover a subscription to its capital stock. Plea, that defendant had cancelled his subscription by virtue of an agreement giving him liberty to do so, made with plaintiff at the time of subscribing. Replication, *de injuria*. *Held* bad, (1) because the plea was a denial of the contract declared on, and not an excuse for its breach; (2) because the plea set up an authority derived from the plaintiff. — *Ruckman v. Ridgefield Park R.R. Co.*, 9 Vroom, 98.

TRESPASS. — See DAMAGES, 4; MASTER AND SERVANT.

#### TRUST.

Property was given on trust to pay the income to A., provided that, if he should become bankrupt, his interest should cease; and in that case the trustees were empowered, at their discretion, "but without its being obligatory upon them," to pay to, or apply to, the use of him or his family, the income to which he would have been entitled if the forfeiture had not happened; and the trustees were in like words empowered at any time to transfer to A. half of the principal trust-fund. *Held*, that on A.'s bankruptcy his assignee had no claim on the trust-fund. — *Nichols v. Eaton*, 91 U. S. 716.

See CORPORATION, 3; EVIDENCE, 5.

TRUSTEE PROCESS. — See FOREIGN ATTACHMENT.

ULTRA VIRES. — See NATIONAL BANK, 1.

#### USAGE.

Evidence is admissible to prove a custom, that, upon a sale of berries in bags by sample, the sample represents the average quality of the entire lot, and not the average quality of the amount contained in each bag taken separately. — *Schnitzer v. Oriental Print Works*, 114 Mass. 123.

See SALE, 1.

USURY. — See NATIONAL BANK, 2; REPEAL.

VARIANCE. — See CONTRACT, 2.

VENDOR AND PURCHASER. — See AUCTION; CONTRACT, 2; DAMAGES 3; FRAUDS, STATUTE OF, 2.

#### VERDICT.

A criminal prosecution, after plea of not guilty, was submitted to the court,

without a jury, for decision upon an agreed statement of facts; and the court found for the prisoner, and gave judgment accordingly in his favor. On appeal, *held* that the finding was equivalent to a verdict of not guilty, and that the Supreme Court could not reverse the judgment, though the agreed facts showed that the prisoner was guilty. — *Olathe v. Adams*, 15 Kans. 391.

See INDICTMENT, 3; NEW TRIAL.

#### VESTED INTEREST.

A wife insured her husband's life for a sum payable to herself, or, in case she should die before her husband, to their children. *Held*, that a child dying before either of his parents had a vested interest, which passed to his representatives, in the proceeds of the insurance. — *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60.

VOID AND VOIDABLE. — See MISNOMER.

#### VOTER.

A foreign-born infant came to this country as a member of the family of his reputed father, whose wife was the infant's mother, and who was afterwards naturalized. On the infant's coming of age, *held* that his right to vote could not be impeached on the ground that he was illegitimate, and not really the son of his reputed father. — *Dale v. Irwin*, 78 Ill. 171.

See BRIBERY; INDICTMENT, 3.

#### WAGER.

All wagers are unlawful in Massachusetts. — *Love v. Harvey*, 114 Mass. 80.  
See ILLEGAL CONTRACT, 1.

WAIVER. — See MISTAKE.

WAR. — See PARTNERSHIP.

#### WARRANTY.

*It seems*, that, in Missouri, if tenant by the curtesy conveys in fee with warranty, his heirs are bound by the warranty to the extent of assets received by descent from him. — *Miller v. Bledsoe*, 61 Mo. 96.

WAY. — See CONSTITUTIONAL LAW, STATE, 1; EASEMENT, 2; MUNICIPAL CORPORATION, 3.

#### WILL.

By the law of California, an instrument wholly in the testator's writing is valid as a will, though not witnessed. A woman in her last sickness wrote, signed, and delivered, to the person to whom it was addressed, a note, as follows: "I wish to give you my watch, two shawls, and also \$5,000." *Held*, that extrinsic evidence was admissible to show that this paper was meant as a testamentary disposition; and that, on proof by such evidence, it might be admitted to probate. — *Clarke v. Ransom*, 50 Cal. 595.

See CHARITY; DONATIO CAUSA MORTIS; EVIDENCE, 5; REVOCATION.

#### WITNESS.

The court made an order excluding all witnesses in a case from the courtroom, except while testifying. A witness, without the procurement of the

party calling him, violated the order. *Held*, that it was error to refuse to permit him to testify, but that the jury might properly take his conduct into account in considering his credibility. — *Davenport v. Ogg*, 15 Kans. 363.

See CONSTITUTIONAL LAW, STATE, 6; EVIDENCE, 3.

#### WORDS.

“ *Any Process in any Civil Action.* ” — See CONTEMPT.

“ *Commercial Brokers.* ” — See AGENT.

“ *Direct Tax.* ” — See TAX, 6.

“ *Exempted from Taxation from and after the first of December.* ” — See TAX, 3.

“ *For Collection.* ” — See BILL OF LADING.

“ *Wholesale Dealers.* ” — See AGENT.

## BOOK NOTICES.

*A Treatise on the Law of Evidence.* By SIMON GREENLEAF, LL.D., Emeritus Professor of Law in Harvard University. Thirteenth Edition. Carefully revised, with large additions, by JOHN WILDER MAY, Author of "The Law of Insurance," &c. Boston: Little, Brown, & Co. 1876. Vol. I.

THE general character of Greenleaf's Evidence as an authority and text-book is now too well fixed to demand any extended comment. In America it has become a legal hornbook, and has been used as such by more of the lawyers now practising in the United States than any other single author, excepting, of course, Blackstone and Kent. Nor has it been considered to so great an extent as those more general works a text-book for students. It is also a *vade mecum* to which the *nisi prius* lawyer constantly has reference, during the trial of causes in court. Its usefulness is attested by an increasing popularity during thirty-four years, in which period thirteen editions have been required.

As Artemas Ward once characteristically said, "A joke, now and then, looks well in a comic paper;" and although Greenleaf's Evidence may not be, in modern parlance, a philosophical work, it has the rare advantage of occasionally, nay frequently, furnishing the reader who consults it with a statement of or a reference to just what he wants. This is the result of several causes. Simon Greenleaf, its author, was a man of learning for his day, and also a man of experience in the trial of cases. After practising law in the courts of Massachusetts, of which Commonwealth he was a native, upon the organization of Maine as a separate sovereignty he became the first reporter of decisions for that state, and during a period of a dozen years published the nine volumes of reports which bear his name, and sustain his reputation as an accurate stater of legal principles and decisions. He appears to have been employed in many of the most important causes determined, and was undoubtedly familiar, as a reporter must be, with the whole common law of his time. We remember an anecdote illustrating his keenness as a practitioner, which may be of some interest, though we do not vouch for its truth. At the time he was practising in Portland, Me., every lawyer brought all his smaller cases by writs returnable before some one justice of the peace, who, as may be supposed, was well inclined to the plaintiff's side in such cases. General Fessenden, Greenleaf's associate and friend at the bar, had brought such a case before his favorite justice, in Cumberland County, about a dozen miles from Portland; and it was arranged between him and Mr. Greenleaf, who was employed to defend, that they should drive out together in a chaise to the place of trial, try the cause, and return together. The trial took all day; and late in the afternoon the justice decided the case in favor of the defendant, saying, that "on the whole the plaintiff had not sustained the burden of proof." After driving towards home in silence for some miles, General Fessenden said: "Greenleaf, that was a very clear case for the plaintiff, and that Justice never decided a case against me before: I don't understand it." "Well," said



Greenleaf, "during the intermission for dinner I took occasion to say to the magistrate that I was very much struck with his manner of conducting a case, and, as I brought a large number of actions, I would like to purchase a quire of his writs; and," he added, taking the writs from under the seat of the chaise, "if you wish these writs, Fessenden, I'll turn them over to you!"

This fable teaches that Mr. Greenleaf was supposed to know the weak side of human nature.

In 1833 he became professor of law in Harvard University. He was the associate of Joseph Story, between whom and Mr. Greenleaf there grew up a lasting friendship, and the strongest sympathy in the work in which both were engaged. Finding that a text-book was needed, adapted, as Starkie and Phillips were not, to the use of American students at law, Mr. Greenleaf united that object with the production of a work which should be of use to the profession. And this, the result of his efforts, has stood the test of time, and has so far rescued his reputation from the oblivion which few lawyers escape. It is true, he amused his leisure hours by publishing a lively work, entitled "Overruled, Denied, and Doubted Decisions and Dicta," which, we imagine, is seldom referred to, inasmuch as all decisions are now overruled, denied, or doubted, somewhere; and also published "An Examination of the Testimony of the Four Evangelists, by the rules of Evidence as administered in Courts of Justice, with an Account of the Trial of Jesus," a fantastical effort to support his own faith and to reduce Pontius Pilate to order, with numerous references to his own work on Evidence, which serves to illustrate the bent of his mind. He is, also, known by his edition of Cruise's "Digest of the Law of Real Property," and is said by "the Mythologists" to have introduced the power-of-sale clause into mortgages; but for this fruitful source of litigation he does not seem to have received any testimonial from his ungrateful brethren. And as the *grab* mortgage is not yet adopted in Maine, and exists in England and in most of the United States, we are inclined to think it must have been a contemporaneous discovery in several places — *Crescit in orbe dolus*. While Mr. Greenleaf knew what students wanted, he also knew the wants of the bar, and his Treatise on Evidence is, no doubt, his best work.

Evidence is defined by him, in substance, to include all the means by which any alleged matter of fact (the subject of investigation) is established or disproved; and he proceeds first to consider what things courts will, of themselves, take notice of without proof. Thus his practical sense, if not philosophy, is shown at the outset, by an attempt at least to make his book symmetrical, and at the same time to disembarass himself of a most mixed question.

As illustrated by Mr. May's notes, this is an amusing branch of evidence, and deserves a moment's notice. It includes the methods of establishing in courts of justice all those things which there is no possible means of proving; and, generally, when your adversary is trying vainly to prove something which "no fellow can find out," the court starts up and proves it for him conclusively, not brooking in these matters any contradiction whatsoever. For instance, the venerable court is supposed to know all past facts, from the earliest dawn of history, say from Herodotus down! No: not all facts; because it appears that the court has to refresh its memory on these subjects from

writers, as it does to guide its judgment upon matters of law by reports; and it cannot refresh its memory from living historians, but only from *deceased authors of reputation*.

Therefore, we remember once, when we offered to prove a certain proclamation of General Butler's, issued at New Orleans, by Parton's life of that warrior, and Moore's "Rebellion Record," this authority was promptly rejected by a court which might have ruled, upon the authority of Goldsmith's "History of Greece" (as first written), that there was a battle between Alexander the Great and Montezuma. The court's knowledge, however, is not limited by history, but extends to the domain of fable; and when some slanderer alleged of a lady that "her friends had realized the fable of the frozen snake," the court nodded, as Mr. Weller did when the "sum about the nails in the horses shoes" was alluded to, and said, that the fable of Phædrus was well known to society. 12 Ad. & El. n. s. 624. Courts differ, too, in what they know. The Supreme Court of the United States judicially knows that the Mississippi River is affected, at New Orleans, by the tide; but the Supreme Court of Texas does not admit that "New Orleans, La.," means New Orleans in Louisiana, but would doubtless take notice that it was not in Texas!!

The courts, if you will show them an old Farmer's Almanac, will rule that the 4th of July, 1840, came on Thursday; but it has never been held that the court knows (or that there is any way of proving) that Havana is within the Tropics. It is reported that Lord Mansfield and a jury found Mauritius to be one of the East Indian Islands. And Suffolk juries (in a case against an insurance company) have been induced by Mr. Choate to find that Smyrna is a European port. In some cases, the courts are very knowing. They know how long is an ordinary voyage by steamer across the Atlantic; how far two places are apart in the ordinary route of travel; and, not knowing how much land is within certain described courses and distances, they know (in Alabama at least) the nature of, and how lotteries are managed. Mr. May says, very pertinently, that there is not much consistency in the cases, and that possibly this may result from the fact that different judges may assume that what is, or is not, known to them, is, or is not, generally known.

But what can one say of the portion of the book which is now more particularly to be noticed, — we mean the part performed by Mr. May. In the first place, Mr. May has added nearly one thousand cases, without adding much to the size of the work. These appear in the notes. The original text is restored, as it should be. The notes of other annotators are condensed, and removed from the text, Judge Redfield's notes being marked R. The headings of chapters are discarded, and large type, convenient *catchwords*, substituted at the beginning of each of the sections into which the work is as heretofore divided, and to which sections the figures in the index refer. The book is handsome, and the text clear. We have had occasion before to speak of Mr. May's work, upon "The Law of Insurance," as thorough, intelligent, and discriminating; and, from reading the notes upon some chapters of this work, we think, upon further use, the research will be found to be thorough, the cases well selected, and the generally very brief and terse statements of the foot-notes sufficient for the practitioner, while the text alone should be read by the student. In making some tests of the notes, we find Mr. May has not

always cited the latest or highest authorities. For instance, under sect. 450, in which the doctrine that the expression of hostility to the prisoner by a witness for the prosecution may be shown on cross-examination, it is said, "The like inquiry may be made in a civil action; and, if the witness denies the fact, he may be contradicted by other witnesses." Mr. May does not cite for the latter proposition *Day v. Stickney*, 14 Allen, 255, which is a civil case, and, we believe, the leading decision in Massachusetts upon the point, but the case of *Commonwealth v. Byron*, 14 Gray, 31, which is a criminal case.

Again : we notice that so weighty an authority as the Supreme Court of the United States has not been referred to upon this question. In the chapter on the number of witnesses required to establish certain classes of facts, we find Mr. Greenleaf, in sect. 460 *a*, *Usage of trade*, says, "It has also been held, that the testimony of one witness alone is not sufficient to establish any usage of trade of which all dealers in that particular line are bound to take notice, and are presumed to be informed." This is stated rather doubtingly, we think, by the author, upon the authority of a *dictum* in *Wood v. Hickok*, 2 Wend. 501. Mr. May points out that the other cases cited by Mr. Greenleaf do not support the proposition. Certainly *Parrott v. Thacher*, 9 Pick. 426, also cited by Mr. Greenleaf, does not, as it merely holds that one witness to a usage contradicted by another equally credible witness, where other witnesses could be obtained, does not prove such usage. This *dictum*, that more than one witness is necessary to prove usage of trade, however, seems to have been carelessly sanctioned in the opinion of the Supreme Court of Massachusetts, in *Boardman v. Spooner*, 13 Allen, 359, Foster, J.; but we think that the matter is set at rest by the decision of the Supreme Court of the United States holding the contrary in *Robinson v. United States*, 13 Wall. 366. This case holds that only one witness is needed to prove a usage. Mr. May does not cite *Boardman v. Spooner*, nor the decision of the Supreme Court of the United States. This is a matter of some importance; we think Mr. May should have seen the case in Wallace. This matter of proving usage is one of most frequent occurrence in courts, as resort to it is so often had to support a failing cause. The courts may well hold that the fact, that credible persons in the trade differ, shows that no such usage exists, — i.e. that it is not "general, well known, certain," &c., — but that the fact of a usage must be proved by more than one witness, is as absurd as the rule of the canon law, that the incontinence of a cardinal must be established by the testimony of *at least seven eye-witnesses*. This rule as to cardinals seems effectually to protect those gentlemen, unless, as Mr. Choate suggested in the Dalton case, one should "select the broad pulpit-stair at an ordination meeting." The absurdity of requiring a plurality of witnesses except in cases of treason, perjury, &c., is illustrated in a case in Mr. May's note, p. 305, in which a husband, having, with a female servant, found his wife with her paramour, recovered before a jury £500 damages of the latter; but in the Ecclesiastical Court was refused a divorce, which was prayed for upon the same evidence.

We believe it is the rule in the courts of Turkey, and of most Eastern countries, that every fact must be proved by at least two witnesses; but this being plainly impossible in a great many cases, by a fiction of the Turkish law, an official witness instructed as to the fact is allowed to be employed to

corroborate the real witness. Sir William Montague, when he was ambassador to the Sublime Porte, mentions this fact in a letter, and also that he found the official witnesses so much more reliable than the actual witnesses, that he latterly had employed official witnesses altogether. It seems that the Turkish law in some respects is wiser than ours, in that, having raised an absurd difficulty, it has provided a fiction by which the difficulty is overcome.

As we look over a portion of this book, we are forcibly reminded of the shifting character of the law and of learning, fast growing obsolete even in such matters as methods of proof. About fifty pages of the work are occupied with discussions of interest as affecting the competency of witnesses, which the statutes of the United States and of many States have now made a dead letter. Indeed, it is probable that before the century closes no common-law tribunals will exclude witnesses on account of interest, except witnesses to wills, or those who allege their own fraud, or such as are excluded by positive statute on account of public policy.

*A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill.* By JOHN MITFORD, Esq. (the late Lord Redesdale). With the Notes of GEORGE JEREMY, Esq., and additional Notes by JOSIAH W. SMITH. Supplemented by an Introduction; Dissertations on Parties to Suits in Equity; Pleadings in Suits in Equity; Practice in Suits in Equity; with Forms of Procedure in Equity, and Notes; and the Practice in Equity of the United States Courts. By SAMUEL TYLER, LL.D. Pp. 757. New York: Baker, Voorhis, & Co. 1876.

In the Preface, Mr. Tyler says: "So I simply, in the course of my duties as a teacher of equity, have reproduced the work of Mitford, supplemented by treatises which I trust make it a work on pleadings in equity, adequate to the requirements of instruction at the present time; and have added to it a treatise on practice in equity, with sufficient forms, so as to make the volume a guide both to the student and the practitioner through the whole course of equity procedure." "The whole volume is prepared in accordance with the dictum of Lord Mansfield, in 3 Doug. 332: 'The law does not consist of particular cases, but of general principles, which are illustrated and explained by those cases.' The present style of editing books, by overloading them with vast accumulations of references to cases, makes them rather indexes than treatises, and unfits them for books of instruction. I have used the last English edition of Mitford, by Josiah W. Smith. While I have retained all the notes and references by Jeremy, I have left out far the larger part of those by Smith, as altogether unsuited to my purpose, consisting as they do of a digest of cases on Parties, and references to the modified English practice, of no authority in this country. I have added some marginal notes and references of my own to the treatise of Mitford." The volume contains an Introduction, of fifteen pages; a chapter on Parties to Suits in Equity, of forty pages; and one on Pleadings in Suits in Equity, of thirty-nine pages; Mitford's treatise, of three hundred and twenty-three pages; a chapter on Practice in Suits in Equity, of eighty-three pages; Forms, of one hundred and thirty-six pages; and an Appendix, containing three acts of Congress, forms of process of the Supreme Court of the United States, the Rules of the Supreme Court of the

United States, and the Rules of Practice for the courts of equity of the United States: with Indexes to the different parts. There is no table of cases. It will be seen, from this statement, that this is a made-up book: made up, however, intelligently, and to accomplish a particular purpose, which is, to teach the old English system of equity pleading and practice as the foundation of the equity pleading and practice in the United States. Few American cases are cited; and none of them is a very recent case. Mr. Tyler has added to the notes of Jeremy a few English cases on parties and practice; but they are all, we think, more than twenty years old. It is, therefore, of set purpose, as he indicates in his preface, that he does not notice the modifications in the English practice, which have been made so largely during the last twenty-five years. His intention is to present the general principles of pleadings and practice in equity, as established in England, before the changes made in and since 1852, as the foundation of the American system of equity procedure. From this, which is the same system in force in England at the date of the Declaration of Independence and at the date of the adoption of the Constitution of the United States, the student can easily trace historically the system of equity pleading and practice in force in any State, as well as the equity practice of the courts of the United States, which is uniform throughout the country.

There is no question that Mitford's is the best treatise on equity pleadings for the purpose of instruction in general principles; and for this purpose it is far better in the form in which it appears here, than annotated to death by all sorts of cases relating to details. Books of reference in the nature of digests are valuable only as they contain all the authoritative cases on the subject, stated and arranged in the best manner; but the great books of the law are not digests, and they are best read entire, in the form in which they were written.

The additions by Mr. Tyler, on Practice and on Pleading, are well written, but are not elaborate enough to be valuable for reference. Their utility consists in giving a student sufficient information of the course of proceedings in a suit in equity, to enable him to understand the application of the principles of pleading. The forms appended are not numerous and varied enough to supply the place of well-known books of equity precedents, but they are well adapted to explain and illustrate the text. The rules of the Supreme Court of the United States are mainly foreign matter, and have little connection with the rest of the book; and the same is partially true of the rules of practice for the courts of equity of the United States. They are not, of course, foreign to equity pleading and practice; but rules of court are easily obtainable, and it is hardly worth while to print them in text-books. It is convenient, of course, to study any book on equity pleading, with reference to the particular rules of some court; for it gives a sense of reality and definiteness to the study; and if any rules are to be printed, Mr. Tyler has acted wisely in the selection he has made.

The volume is of little use to lawyers, except to recall to them distinctly the leading principles of equity pleading and procedure, which are sometimes lost sight of in the examination of a multiplicity of cases; and perhaps a frequent recurrence to general principles becomes every year of more im-

portance to lawyers in practice. To students it will prove as useful as any single text-book on these subjects.

We notice but one blunder, or perhaps misprint, to wit: "When the defence is insufficient, the *demurrer* is the remedy to test it as a pleading," pp. 91, 92; but a demurrer to a plea or answer in equity is unknown.

The title of the book, "*Mitford's and Tyler's Pleadings and Practice in Equity*," does no injustice to the living. The portions by Mr. Tyler, although substantial additions, have nothing new or difficult in them; and are not of such a character, either in extent or kind, as to deserve very great praise for being well done. They merely give such information in regard to parties and the course of proceeding in equity as a student needs in order to understand the nature and purpose of equity proceedings.

*Massachusetts Reports*. CXIX. Cases argued and determined in the Supreme Judicial Court of Massachusetts. October, 1875—March, 1876.

JOHN LATHROP, Reporter. Boston: H. O. Houghton & Co., Corner Beacon and Somerset Streets. 1876.

THIS volume treads close on the heels of its predecessor, and contains the cases decided between Oct. 1, 1875, and April 1, 1876. The decisions possess, therefore, a contemporary interest, often lacking in volumes published under the old system of the Massachusetts reporters.

Mr. Lathrop's work is in the main well done, and the faults which we have taken occasion to criticise before are less conspicuous. His head-notes, however, would be better if a little more pains were taken to condense them and to avoid repetition. Thus, in *Commonwealth v. Tolliver*, p. 312, it seems useless to repeat at the beginning of each of the four paragraphs in the head-note the words, "On the trial of an indictment for robbery;" and even more striking is the head-note in *Connecticut Trust Co. v. Melendy*, p. 449, which is divided into three paragraphs, each beginning, "In an action upon a promissory note against the maker, it appeared that, after the note matured, an arrangement was made by which a new note for the same amount was given, signed by the indorsers of the note in suit, and the issue was, whether the new note was given in payment of the note in suit, or as collateral security for it." It certainly cannot be necessary to state three times in the head-note what the court found it necessary to state only once in the opinion.

*Hall v. Ripley*, p. 135, *Commonwealth v. Bulland*, p. 317, and *Watkins v. Bowers*, p. 383, afford conspicuous examples of the same fault, which is perhaps the more noticeable because Mr. Lathrop's reports are naturally compared with the volumes so lately published by Mr. Green, who possessed a rare power of clear and condensed statement. In some instances, also, the reporter gives in one paragraph the general principle which the case establishes, and in the next states the case and the decision. This is generally a mere repetition, which should be avoided by omitting the statement of the general principle.

In other respects there is little to criticise in the reporter's work. Occasionally we are inclined to question his judgment in reference to the insertion or omission of a counsel's argument; but in this matter the discretion

of the reporter is even more absolute than the judicial discretion, which we are taught to suppose confined by certain shadowy limits. Certainly it is more difficult to lay down rules for its guidance. *Parker v. Parker*, p. 478, however, is a case where omission has been carried so far as to make it impossible to determine either what question the parties desired to present, upon what grounds they rested their case, or what the court in fact decided. It is difficult to believe that executors, who had neither real nor personal estate to distribute, would ask instructions from the court as to the method of distributing it; or, if executors were foolish enough under such circumstances to ask for instructions, that the case would be reserved by a single justice for the consideration of the full court: yet both of these things apparently were done in *Parker v. Parker*. The argument of the counsel for the petitioners, if printed, could hardly fail to make the case more intelligible. We have pointed out these examples of Mr. Lathrop's faults, not from any ungracious desire to criticise, but in the hope of making better what is already good.

The volume begins with the carefully argued and considered case of *The Old South Society v. Crocker*, in which the question of what is necessary to make a gift a public charity was presented and discussed with an exhaustive fidelity, which will make the case a leading authority.

*Fowler v. Pickering*, p. 33, a case of little importance in itself, is rendered worthy of remark by the beautifully clear opinion of the late Mr. Justice Wells. It is a model of judicial style; and in a very few words corrects an error into which courts have often fallen, where evidence of a usage has been offered. The plaintiff, a pilot, sought to recover for certain services, on the ground of a usage to pay for them, well known in the port where they were rendered. The presiding judge instructed the jury, that, if they found the usage proven, they must find for the plaintiff. The ultimate fact to be proved was, that the defendant did promise to pay for the plaintiff's services: a usage to pay for them, if proved, was a fact from which the jury might infer such a promise; but they were not bound to infer it. Whether the promise was made was still a question of fact; and so the court holds.

In *Spurr v. Scoville*, 3 Cush. 578, the court decided that it could not enforce the specific performance of a contract to sell land in Massachusetts, where the defendant was not a resident of the State, and was not subject to its jurisdiction. In *Felch v. Hooper*, p. 52, the plaintiff under a bond for a deed of certain land, and with the permission of the obligor, entered thereon and built a house. He paid a certain sum on the delivery of the bond, and tendered the balance of the purchase-money to the obligor at the time designated in the bond for its payment; but the latter refused to execute the deed. To a bill in equity brought to enforce the conveyance, the defendants, who were not and never had been residents of Massachusetts, demurred, on the ground that the court had no jurisdiction. The court, however, held that the land was charged with an implied trust in the plaintiff's favor, and that under Gen. St. c. 100, sec. 15, it could appoint a trustee to make the conveyance, in order to carry out the trust. The opinion recognizes the well-established doctrine in equity, "that from the time a valid contract for the sale of land is made, that which ought to have been done is treated, as between the parties, as already done:

and the seller and his representatives, and subsequent purchasers from him with notice, will be held as trustees for the purchaser, for the purpose of affording the latter a remedy against the estate." If the making of the valid contract charges the land with a trust in favor of the purchaser, it will not be difficult, under the doctrine of this case, to enforce specific performance of such a contract against a non-resident; and the authority of *Spurr v. Scoville* is essentially impaired.

*Martin v. Tapley*, p. 116, is a curious case, and contains an interesting discussion as to the position and rights of the counsel for a deceased party, as *amicus curiæ*. The opinion of the Chief Justice seems conclusive; but we cannot help sympathizing with the *amicus curiæ* in his struggles to excite a reciprocal regard in the breast of the court.

In *Norton v. Boston*, p. 194, the court again decides that it has no jurisdiction in equity to restrain the sale of land for non-payment of an illegal tax, because the land-owner can either allow the sale to proceed, assured that, if the tax is illegal, no title will pass, or can pay the tax under protest and recover the amount by suit. It is too late to disturb the rule now so well established; but it has always seemed to us, in regard to the first alternative, that a court of equity, which will remove a cloud upon a title, has at least an equal right to prevent the title from being clouded; and, in regard to the second, that the remedy which the court suggests is only effectual if the land-owner has the money to pay the tax, which the court has no right to presume. A man is bound, perhaps, to have money enough to pay his just debts; but he is not bound to have enough to pay illegal exactions; and to a poor man, the owner of an estate already mortgaged, so that he can no longer use it as security, and having no other property, the remedy which the court suggests must seem more plain than adequate. This is no imaginary hardship. When, as is not uncommonly the case with betterment assessments, the tax amounts to many thousand dollars, the difficulty is very real; and the owner of an estate, who must either allow it to be sold, with the risk of losing it if the assessment is held legal, or pay a sum of money which he has not got and cannot raise, is placed in an awkward dilemma.

In *Foote v. Hartford Insurance Company*, p. 259, the owner of a mortgaged estate insured it by a policy payable in case of loss to the mortgagee. Subsequently he released his interest to the mortgagee, taking back a bond to reconvey upon payment of the mortgage debt, which was not recorded, the mortgagor remaining in possession. The policy contained a clause rendering it void, "if any change takes place in the title or possession of the property." In a suit on the policy, the court held that it was avoided by the release, on the ground that, under Gen. St. c. 89, sec. 15, the legal effect of the absolute conveyance was not affected by the unrecorded defeasance. As the real ownership and the actual possession of the property insured remained unchanged, and the risk was in no wise increased, this seems a strict construction. The case of *Tomlinson v. Monmouth Ins. Co.*, 47 Me. 232, is cited by the court as sustaining the decision. The later case of *Smith v. Monmouth Ins. Co.*, 50 Me. 96, which held that such a transaction did not avoid the policy, although the defeasance was not recorded till nearly two years after the loss, is not referred to. Nor is it *Holbrook v. American Ins. Co.*, 1 Curtis, C. C. 183,



mentioned, which is an authority against the court's position. We regret that in this case the arguments of counsel, or at least the authorities cited, were not printed by the reporter.

In *Ela v. Cockshott*, p. 416, a rule is laid down which will somewhat astonish the Bar. In this case, the defendant's counsel presented written prayers for instructions at the close of the arguments and before the charge. The judge refused to read them, but informed the counsel that at the close of the charge he might call the judge's attention to any point not covered by it, or to which he objected. At the close of the charge, the counsel, instead of following the judge's suggestion, again presented and read his prayers; but the judge refused to give them, and disallowed the counsel's exceptions to his refusal. Upon this statement the court says, and we quote from the opinion: "Before the argument, it was the right of the defendant by his counsel to present requests for instructions, and to have them examined by the judge, and passed upon at some time before the jury retired. After the arguments were concluded, the counsel has no right to address the court or jury upon the law or the facts of the case, except by leave of the presiding judge." The rule thus enunciated is certainly not contained in any statute or rule of court, and is, we venture to say, in direct conflict with the long-established practice in every county in the Commonwealth. A counsel often hears a theory of the case advanced in his opponent's argument, which is wholly new to him, or a claim made as to the law, which seems clearly erroneous, and which he could hardly have anticipated. If he cannot call the court's attention to it, and pray for appropriate instructions after the argument, his client's rights may be put in serious jeopardy. Again: if a judge omits to cover a point, the simplest and best way of calling his attention to it is by presenting a written prayer for the proper instruction at the close of the charge. In this way all danger of error and uncertainty, as well as the confusion produced in the minds of a jury by oral discussion between court and counsel, are avoided. There must be this right to address the court after the charge to supply omissions or correct errors; and upon what principle or for what reason the right to present written prayers at the close of the arguments and before the charge is denied, we cannot understand. Then only is the case fully made up, and the claims of both sides fully presented; and then errors and omissions in the charge can be prevented, which, after the charge, can with difficulty be corrected. To require counsel to prepare such prayers before the argument is impracticable, both because the case is not fully shaped till the testimony is concluded, after which and before the arguments there may be no time to draw the requests which are needed in a complicated case, and because, till the position of the other side is stated in argument, it is impossible to anticipate every point upon which the jury may require instruction.

There are other interesting cases which invite discussion; but we have already yielded unduly to temptation, and must refer our readers to the decisions themselves for not a few curious points, which we are unable to mention.

A supplement to the volume contains the proceedings of the Bar at the meetings held in honor of Mr. Justice Metcalf and Mr. Justice Wells.

*Essays in Anglo-Saxon Law.* Boston: Little, Brown, & Co.; London: Macmillan & Co. 1876. 8vo. pp. xii, 392.

THESE five essays, the work of Messrs. Henry Adams, H. Cabot Lodge, Ernest Young, and J. Laurence Laughlin, whose researches have been conducted with mutual aid, and under Mr. Adams's general supervision, are remarkable in the first place for their entire and almost polemical renunciation of English models, and for their adoption not only of German methods, but of the authority and opinions of the now dominant German school. The views of Kemble, Sir Henry Maine, Stubbs, or Freeman, are rarely mentioned, except to be set aside; while Sohm, Maurer, Heusler, and Laband, are deferentially cited on every other page. This is due, we presume, to the influence of Mr. Adams, and is as it should be; for, without acquiring German exactness in details, it is vain for other nations to hope to surpass them by the mere force of historical imagination or philosophic insight. All scientific study nowadays is microscopic, even the study of history; and broad generalizations may depend at last on the reading of a text as well as on the structure of a fibre. The book before us shows a more minute and painful scrutiny of the obscure sources of Anglo-Saxon law than we are accustomed to see in English writings upon such subjects: more, we believe we may say, than any parallel English work we know. The ideas are no doubt German, but the material has been worked over in a very useful and effective way.

Mr. Adams leads off with an essay on the Anglo-Saxon courts, in which the doctrines of Sohm's *Altdeutsche Reichs- und Gerichtsverfassung* are applied to the materials furnished by the Anglo-Saxon laws and charters. Sohm argues that the German state, as we first know it, was a political unit, exercising the powers of sovereignty; and that it had but one subdivision, — the hundred, — the members of which, assembled under the presidency of their *tunginus*, constituted the primitive and democratic court of law. Mr. Adams finds ample evidence of the Hundred Court in the Anglo-Saxon sources. But, he says, the primitive German state was territorial, and the hundred was a territorial district; and the difficulty is to prove that there was such a district in England corresponding to the court. It is to be found, however, in the *regio* of Bede, and the other early writers, whom Dr. Schmid had supposed to give no countenance to its existence. But just as the territories, which afterwards took their names from the independent populations mentioned by Tacitus, became in time the subdivisions of an empire, so, in England, the state of the seventh century became the shire of the tenth, and the shire of the seventh became the hundred of the tenth. Alfred, although he may have introduced the name "hundred," did not create the thing. The meeting of the old principality becomes the shire court, and the highest court is the witan of the new kingdom. There is, however, no appeal; no jurisdiction of the king outside the court; no such dissolution of the stiff barbarisms of the folk law as took place on the Continent, through the gradually extended administration of a more liberal system on the part of the crown. But it may be asked, What part did the jurisdiction of the Manor Courts play in this simple scheme of administration? Mr. Adams replies, that the Manor Court did not in fact exist as a part of the recognized legal machinery until towards the end of the tenth century, when,

under the influence of Norman ideas, jurisdiction came to be regarded as property, and the subject of royal grant. Dr. Schmid and Konrad Maurer agree that *sôcn*, one of the ordinary incidents of the later grants, occurs most frequently in the sense of jurisdiction after the approach of Norman times; and the latter says that there is little direct proof of private jurisdictions before the reign of Cnut. Mr. Adams goes farther, and not only denies that any passage in the laws or charters earlier than Edward the Confessor warrants that interpretation of *sôcn*, but rejects the arguments of the German authorities, that the thing at least existed long before. The date of private jurisdictions is one of the oldest controversies in the law, and cannot be discussed in a paragraph. It may be true that the Manor Courts were not recognized as a part of the system of public administration until the period fixed by Mr. Adams; and that is all his argument requires. He does not seem to us, however, to have controverted Maurer's opinion with conclusive success. It strikes us as a more reasonable hypothesis that the jurisdiction of the Manors was originally confined to dependants, who had no standing in the Hundred Courts, and that it was afterwards extended to freemen, — in a word, that it was a gradual growth, — than that it was suddenly created in consequence of a change from the definite conception, that all jurisdiction emanated from the democratic state, to another equally definite, that it was the private property of the king. We may mention, in addition to the arguments of the German writers, that we find in the Norman books that the *sokeman*, who was the suitor of the Manor Court in manors of ancient demesne, and who was excused from inquests outside the manor, was a freeman, holding by villein tenure. But lands held by villein tenure were lands originally held by unfree persons, whose *status*, becoming impressed upon the land, was assumed *pro hac vice* by subsequent free purchasers, with its attendant duties and exemptions. With regard to the history of the word "*sôcn*," and its various meanings, Mr. Adams is in substantial accord with the Germans; but, for the question before us, the later definitions, such as that in LL. Edw. Conf. 22, and the use of the same word in the Northern sources, are not so wholly devoid of import as to deserve no mention.

Mr. Lodge handles the more familiar subject of land law. Want of space forbids our giving more than a hint at the contents of this very intelligent article. Land, he says, might be book, or not book, — the latter including the family, common, and folk lands; and he makes the valuable suggestion, which is easily forgotten, but is most important to remember, that land might have several characters at once. Thus, A. may hold folkland; a dependant community may hire of him, — and each member of the community will hold his share as *laen*. The *laen* land being, as is shown elsewhere, not a term of years, but a *quasi* estate for life, whether booked or unbooked, and, in the latter case, a portion either of the folkland or of the utland of the lord. Bookland (treated last) is simply, of course, land conveyed by the written instruments introduced by the church, of which the main fact to be noted is the strict adhesion to the terms and conditions of the book. The early traces of mortgages, wills, &c., we can do no more than allude to.

Of the unbooked land, we find the house and curtilage the private property of the family as early as Tacitus, and inalienable beyond the limits of the family, except by the consent of all concerned. Mr. Lodge thinks that

the intent of LL. Alfred, Ch. 41, forbidding a sale of bookland out of the family, if such a sale was forbidden by the original grant, was to cause bookland which had passed through one generation to be treated as family land. We should have thought that this was precisely what the law sought to prevent; and that it showed not only that family land was beginning to be alienated as individual property, but also a tendency to treat bookland, granted subject to the same restrictions, in the same way. The law, as we understand it, enacted that (although the old customary restriction on family lands had become obsolete) the similar express restrictions of a deed were to be respected, — an interpretation which Mr. Lodge would repudiate, on the ground that the conditions of a book needed no legislative confirmation.

The folkland, as is well known, was the originally unoccupied land, which became national property, subject to the control of the king and witan; and it is thought that this alone at first bore the burden of taxation proper, as distinguished from the personal *trinoda necessitas*, which was imposed on every freeman. It is also thought that the characteristic of an estate of folkland was that it reverted to the state on the death of the grantee, like the Carolingian benefice. Laens of folkland have been alluded to above. The folkland was ultimately appropriated first by large, then by small, holders; and what remained at the time of the Conquest reappears as *terra regis*.

Family law is next treated by Mr. Young, in a very interesting way. He divides his subject into the *maegth* and the household. The former included all "who have common blood with each other or with a third, originating in lawful marriage." The order of succession, the duty of protection and right to *wergeld*, may be passed over here, as the *maegth* disappeared at an early date. The Family is a more important subject. The first point to note is the denial of Sir Henry Maine's assumption, that the remains of a *patria potestas* may be traced in the German family. The notion in vogue on the Continent thirty years ago that the *mundium*, in its primitive form, in any way resembled a *patria potestas*, has been given up, we believe, by the best authorities. There was no system of agnatic relationship upon which such a power must depend. Indeed, as has been often suggested, there are indications in Cæsar and Tacitus that a system of kinship through females only had not been wholly forgotten when they wrote; although, it should be added, a similar system has been adduced to account for some of the earlier phases of Greek and Roman history.

After a statement of the powers which the father did possess, we come to the instructive discussion of marriage. The German marriage first appears in the form of a sale; and we may suggest that the fact, that the price paid was fixed and conventional, does not seem to raise a serious doubt that the transaction was originally in substance that of which it retained the form.

The *weotuma*, or price paid the guardian of the woman at betrothal, gave the future husband a right to the woman as against third persons, although the bargain was not performed on her side until the subsequent marriage. Later, the man also postponed performance to the time of the marriage, giving earnest instead of paying the price when betrothed. Moreover, the sum, when paid, is now to go to the wife. The old morning-gift to the wife, and the *weotuma*, which formerly went to her guardian, were merged in the betrothal

deed, and became the dower *ad ostium ecclesiæ* of Norman times. Both this and the next essay dwell somewhat more than is necessary upon a fact which has the sanction of Sohm, that the early German sale was effectual to pass title before a delivery or performance on the part of the seller, as in the above instance. This seems to be done with implicit adoption of Sir H. Maine's suggestion, that contract sprang out of sale at Rome in that way. It must not be forgotten that there is a limit to historical explanation, as it is called. Some things (the origin of the notion of property, for instance) receive more light from an analysis of human nature. It may be doubted whether contract is not of this sort; and if historical first forms, rather than explanations, are to be sought, a pretty good argument could be made for competing cases; *e.g.*, that of hostages, who have softened down into the sureties of modern times.

The last and longest essay is that on Legal Procedure, by Mr. Laughlin. It deals with the part of the law which throws the clearest light on early institutions, and yet which has received the least attention from English writers. It collects and arranges a thousand minute facts, and extracts inferences from the most difficult sources. It must be admitted that the subject requires a more experienced hand. Things which a lawyer would state clearly, are made obscure for want of a proper terminology; and the reader will hardly finish the piece without a feeling that the Germans are clumsy and weak, as compared with the English, in bold and sober generalization. On the whole, however, this was the most laborious and difficult undertaking in the book; and Mr. Laughlin has done a piece of work for which future students will not fail to be grateful. The forms of procedure which are successively taken up are these: 1. Debt. 2. Action for movables, (a) voluntarily parted with, (b) involuntarily parted with. 3. Action for land. 4. Criminal procedure. The action for debt connects itself with the executive procedure explained by Sohm, not without obscurity of language, in his "Procedure of the Salic Law." This procedure seems to show the first intervention of public power to give form and moderation to the self-redress of an extra-legal condition. The plaintiff conducted the summons, and, after obtaining the sanction of the court, himself collected the claim, without being put to prove it. Even in the Anglo-Saxon procedure the court did not adjudicate upon the evidence as in modern times, but, if the plaintiff had complied with all the requisite forms, simply determined the nature of the oath which the defendant must take to clear himself. It is this oath, we presume, which survived into modern times as the wager of law.

The action for movables voluntarily parted with did not lie against any but the original receiver, — a principle, by the way, to be found in force as late as Henry VII., with regard to a wrongful sale by a bailee. Y. B. 21 H. VII. 39. The action for movables involuntarily parted with was deemed so indivisibly connected with the trespass of the taking, that it was only allowed to the person deprived of possession. The owner who had intrusted his property to a bailee could not sue, but the bailee was the proper plaintiff. A guilty defendant not only had to give up the property, but to pay a fine for his theft; and the defence might be directed to the escape from one or both of these. The details, as well as the discussion of vouching to warranty, we must omit. But we interrupt the author to mention the remarkable fact, that there is evidence that the community witnesses to sales mentioned by him are a later

development of the originally necessary assent of the kin. The procedure for land differed from the procedure for movables, in the fact that, for instance, if a vendor of land, before delivery, sold it again, the first purchaser could sue the second, and was not compelled to look to his vendor. It is thought that the modern contradictory procedure originated with this form of action, from the circumstance that a plaintiff, having a title by deed, might prevent the defendant from simply swearing to his right of possession, by proving his charter. The order of procedure in different cases next commented on at great length seems to be in great part referable to the nature of the issue developed by the pleadings.

The criminal process has undergone three stages: First, when most offences were followed by outlawry; next, when for many of the above a fixed composition could be paid, with outlawry as an alternative; last, the period of true punishments. The Anglo-Saxon law was in the transition period.

We wish we could give more than this meagre sketch of a book we have studied with care and profit; but we must leave it, with the remark, that such monographs as these prepare the ground for a truly philosophical history of the law, and that, without such a history, the foundations of jurisprudence will never be perfectly secure.

*Leading Cases done into English, by an Apprentice of Lincoln's Inn. Second Edition. London: McMillan & Co. 1876.*

WE have before us a little book of only sixty-four pages, containing twelve poems of various lengths and styles, each of them devoted to the versification of one of the well-known leading cases of the courts of Great Britain. The subject-matter of these poems, and their uniform excellence, however, negative the idea at once that they are the work of the "idle apprentice." We find our old acquaintances, *Coggs v. Bernard*, *Manby v. Scott*, *The Six Carpenters' Case*, *Scott v. Sheppard*, and many others, translated into poetry, the style of the verse selected with an apt reference to the peculiar character of each case. It is difficult at first to recognize our old friends in their new disguise; and we, for the first time, were enabled to read them all with pleasure and amusement. And, in reflecting upon their singular transformation, we are impressed with the feeling, that this little book is little only in its outward appearance, and that it contains a great idea. It is, in fact, the germ-cell, so to speak, of a new system of legal education. It is the beginning of a new era.

Let us explain what we mean. It is a well-known fact, that very young lawyers—the sucking Chief Justices, as they are sometimes called—often experience great difficulty at first in taking hold and in grasping the great principles of the common law. The fault must necessarily belong to the present system of teaching. It cannot be in the learner; for it is a historical fact, that many of the greatest luminaries of the law have experienced this difficulty. Lord Eldon nearly deserted the law, to accept the position of recorder in a small provincial town; and our own great Daniel, in his youth, was so perplexed and discouraged by the study of Coke on Littleton, that he was obliged to lay it aside in disgust, and take up some lighter reading. He, though naturally no poet, had a glimpse of that new system which we now purpose to advocate; and, in a letter to his friend Bingham, dated Jan.

19, 1806, he makes this suggestion: "If the legislature will but put our writs into a poetical and musical form, it will certainly be the most harmonious thing they ever did." He thereupon put into verse a writ which he was then filling out in his little country-office. It ran as follows; viz.:—

"All good sheriffs in the land,  
We command,  
That forthwith you arrest John Dyer,  
Esquire,  
If in your precinct you can find him,  
And bind him."

We have no doubt that he would have actively pursued this idea, if he had not been occupied in after life by other, perhaps more pressing, duties.

Then, again, it cannot be denied that the mental exercise of writing poetry is one which tends to produce a precision of thought and language, and great accuracy and conciseness in the description of facts. Any of our readers who have endeavored to make a metrical version of the Psalms will bear witness to the truth of these statements.

Moreover, it is a familiar truth that rhymes have been used as the principal feature of all mnemonic systems, from time immemorial. Having in mind, therefore, these three objects,—1st, To make the study of the law attractive, nay, even seductive, to the young of both sexes; 2d, To foster habits of accuracy and conciseness in statements of the law, in the members of the court, and the profession generally; and, 3d, To assist the public, and especially the profession, to remember what the decisions of the Supreme Court are,—we desire to offer a plan, by means of which these highly desirable ends can be attained; and, in so doing this, we modestly disclaim the merit due to the discoverer of a great truth. Daniel Webster, in his poetical writ; the efforts of other great jurists, which occur to every one of our readers; and the industrious apprentice, in the work before us,—have all provided finger-posts, to guide us on the way to the great result. We hold ourselves merely the office of advocates, and, as such, request the thoughtful attention of the profession. What the times demand, what the profession requires, is a poetical reporter of the decisions of the Supreme Court. Perhaps the suggestion will be made, that it would be much better to have, at least, one member of the Bench itself a poet; and that the other members could do the necessary and useful work of making the decisions, while the poet could make them beautiful. We admit fully the truth of this suggestion; but let us make haste slowly. We cannot spare, at present, the services of any of the worthy occupants of the Bench; and we fear that they are too old to begin to poetize now. But we can easily have a poetical reporter now; and, when the next vacancy occurs upon the Bench, we can bring the requisite pressure to bear upon the appointing power, and secure our *desideratum*.

We heartily wish that we were younger ourselves, and had the ability to fill the position of such a reporter. But we are too old; and, as the proverb says, to the old for advice, to the young for action: *Non possumus versificari*. We wish it were not so.

Let, then, the reporter begin at once to practise his new profession, and give us at least the rescripts, as they come down from the Supreme Court, aptly clothed in the robes of poetry. For instance, take the collected wisdom of the court in the matter of woman's right to office, could it not be briefly expressed thus?—

“Woman! thy mission is to please:  
Not to be justice of the peace;  
Content with what the laws allow,—  
A school-committee woman, thou!”

*Opinion of Justices, 106 Mass. 604.*

There is the whole matter in a nut-shell, which any child can crack! What a saving of time! how easy to remember! how melodious!

It cannot be claimed, with any regard to truth, that there are no proper materials for poetry in the reports. Even a careless perusal of them will show that they actually teem with subjects for poetry. All the cases exhibit human nature in some one of its different aspects, and some of them present great and dramatic situations. Some, of course, would tax the powers of an inexperienced reporter, but many are of such a character that they would almost *propria motu* burst into song and metre.

Take the long struggle of fallen man and woman, upon the slippery sidewalks of the cities, to obtain reparation for their sufferings. The unsuccessful attempts might properly be put into some elegiac measure; but when, after years of failure, there arose a new reformer, a second Luther, who discovered that ridges of snow were actionable defects for which towns were liable, who succeeded in finding the ridges and in obtaining a verdict for a fall thereon, would not the tale of his success be fitly expressed in light and flowing lyrics, not wholly unmindful, however, of the gravity of the event? We offer, modestly, the following example of how it might be done:—

“In Worcester, when the sun was low,  
Trodden in ridges lay the snow;  
Across the walk he tried to go,  
But fell, tho’ walking carefully.

“Had Luther seen another sight,  
Of sidewalk smooth with ice that night,  
Without a ridge thereon, he might  
Have suffered, without remedy.

“The court this plain distinction draw:  
‘When ice and snow, by natural law,  
Are slippery found before your door,  
You fall,—the town’s not liable.

“‘But when by man they’re trodden down  
In ridges, or an icy crown,  
You, falling then, can sue the town,  
And get your heavy damages.’”

*Luther v. Worcester, 97 Mass. 272.*



We do not claim, ourselves, to be the possessors of the divine *afflatus*. As we have already stated, we do not intend to run for the office, nor be counted into it; and we do not wish to have our motives misunderstood. We merely offer a few humble examples, which, perhaps, can serve also as a warning to the coming man.

We all know that the great struggle of woman in this country for her so-called rights has been fought on various battle-fields, with unvarying success. We do not propose now to discuss the legal or moral aspects of these claims. We refer only to accomplished facts, which are but too well known. It has been shown that woman has but to demand it, and all that man has is hers. It has been said that we are living over a volcano. How that is, we shall not attempt to say. We know, however, that at the appearance of a slight smoke, or the gentlest rumble, man, the tyrant, has at once given up, one after the other, his most cherished and immemorial rights. He was forced, at first, to give up to woman all her own property, after being forced to endow her in marriage with all of his. He then was obliged to allow her to become a doctor; to be responsible for her own contracts and torts; and to sell or give away her own property; and now, finally, he has had to forego the sacred right of physical correction. We fear, moreover, that the fight is not yet over, and that it is but a question of time as to when woman will vote, and be governor, and judge, in name as well as in fact. The following battle-hymn attempts to commemorate, or rather report, the facts of the last painful defeat of man, in his futile attempt to escape the penalties of manslaughter, by pleading that he had, at common law, the right to beat his wife for insolence and drunkenness. It is necessarily in the narrative form, and is written, as might be expected, from the victor's point of view.

Hugh McAfee, of Boston town,  
Claimed, that, at common law,  
He had the right, when she was drunk,  
To beat his wife therefor.  
As a defence, he claimed it,  
Upon his trial day,  
And swore his wife was insolent,  
And, when he struck, he never meant  
To take her life away.

Then out spake Reuben Chapman,  
Chief justice of the court :  
" To every woman in this state  
Life may be long or short ;  
But, while I hold this office,  
No woman in this land  
Shall lawfully be beaten  
By her husband's brutal hand."

Hugh McAfee, the husband, was  
Convicted of manslaughter ;  
And thus the everlasting right,  
To every wife and daughter,

By brave old Reuben Chapman's act,  
Was given on that day,  
To get drunk and be insolent,  
Free from a husband's sway.

*Commonwealth v. McAfee*, 108 Mass. 458.

With this specimen we close this already too long and too discursive review; though it is hard to do so, with the wealth of subjects for poetic effusion before us. We should have liked to lay before our readers a merry rhyme, suggested by the case of *Commonwealth v. Vermont R.R. Co.*, 108 Mass. 7, based upon the unexpected extinction of a pop-corn boy, by the very railroad train in which he had for many years tortured the helpless passengers. There are others equally tempting; but we must stop somewhere. We have done our duty in bringing the subject before the public. We, though ourselves plural, are unfortunately not numerous enough to bring about a reform, without external aid. The duty of further work now falls on others. Let the reporter look out,—he may be, as he apparently is, sufficiently accomplished for the performance of the prosaic duties of his present office, but, if he wishes to be his own successor, let him buy a *Gradus ad Parnassum* at once, and study it faithfully.

*United States Reports*. Vols. 91 and 92. Cases argued and adjudged in the Supreme Court of the United States, October Term, 1875. Reported by WILLIAM T. OTTO. Vols. I. and II. Boston: Little, Brown, & Co. 1876.

THESE are the two first volumes of the new series of the Supreme Court Reports, and are the first result of the labor of Mr. Otto, the new reporter. We have examined them with great satisfaction and pleasure. We were hardly prepared for so great an improvement at once in the reports of that court. The reporter has carefully avoided the faults of his predecessor; and his reports bear the marks of faithful and conscientious work, successfully performed. The praise which belongs to him is much greater than it would have been if he had only to follow an example of good reporting. But we would not have it supposed that we are pleased with these merely because they are an improvement on former volumes of Supreme Court Reports. On the contrary, we think the work, tested by any other standard, is exceedingly well done; and these volumes are in themselves highly creditable to the reporter. The statements and the head-notes are generally clear and precise, and are expressed in simple and accurate language; the head-notes also have the merit, not always belonging to head-notes, of being easy to understand.

There is but little in Mr. Otto's work which we should care to see different. We are inclined to think that, a little too often, the whole report consists only of the judgment of the court. In most of these instances, the court has itself undertaken to state the case in the judgment; and it would be hard, under such circumstances, to blame the reporter for not trying to do it better himself. Still, it might sometimes be done. Taking, for example, *Angle v. North Western Mutual Life Insurance Co.* (vol. 92, p. 330), one or two pages of statement by the reporter would have made the case much more intelligible to the reader than it is made by the seven pages through which the facts are scat-

tered in the judgment of the court. Occasionally, in cases brought up by writ of error, it is not quite clear at first which of the parties was originally plaintiff, and which defendant; and this is a little confusing: the words "plaintiff" and "defendant" are themselves so much like algebraic signs, that it is desirable that it should be distinctly expressed which is the one and which the other, and that they should not be confounded with "plaintiff-in-error" and "defendant-in-error." Mr. Otto's words are generally correct and well chosen. We should like, however, to see the word "suit" less frequently applied to actions at law. In popular phraseology, all kinds of litigation are called suits; but, in strictness, "suit" belongs to equity, as "action" belongs to common law: we never hear of an "action in equity," and there is something of the same incongruity in the phrase, "suit at law." We have observed in these volumes a few instances of incorrect or slovenly citation of cases in the judgments of the court; thus, we find (vol. 91, p. 54) *Oates v. Turquand* cited as in L. R. 2 Ap. Cas. 325, for which the proper citation is L. R. 2 H. L. 325; one of the new series of the Law Reports, which began with this year, is cited as Appellate Cases, and, when the second volume is published next year, it will be likely to be mistaken for the one above referred to. The citation "Law Reps., C. P. 1, 1865-66," also occurs. It is to be hoped that the reporter does not consider himself bound to publish such citations without correction, merely because they come in that form from the court. References to "Eng. L. & Eq." are sometimes to be found, but ought never to occur: if a case is cited at all, its place in the regular reports should be mentioned.

In noticing the reports of the late reporter, we spoke of the system of naming the cases. In this respect, as well as in others, there is a great improvement in these volumes. We think, however, that it would be more convenient if the cases were all designated by the surnames of the first plaintiff and the first defendant, without the use of "*et al.*," to indicate that there are more than one, and without mention of the character in which a party sues or is sued; for example, we should prefer (in vol. 91, p. 105) *Long v. Converse*, instead of *Long et al. v. Converse et al.*, and (p. 516) *Lathrop v. Drake*, instead of *Lathrop, Assignee, v. Drake et al.* The abbreviations of the names of parties which are corporations, to which we have objected, does not, we believe, occur, except in the running titles, where they are sometimes not quite intelligible (e.g., *Phillips, &c. Const. Co. v. Seymour et al.*, vol. 91, p. 648). There would be no occasion for such abbreviation if the titles of the cases were printed in the margin, as they should be, and where it is the most convenient to have them. They were so printed in the time of Wheaton's Reports; and we see no reason why reports now should be inferior in that respect. Probably a suggestion from the reporter to the publishers would lead to the desired restoration. We mention these things, not because we wish to find fault, but because we find in Mr. Otto's work so much excellence and so much care to avoid the faults of others, that we think that criticism may usefully descend to small details.

We shall not in this notice undertake to say any thing of the points of law determined in the cases reported in these volumes. The most important of these cases have been mentioned in the pages of this *Review* during the past

year. It is surprising to observe how many of those reported have very little interest or importance on account of the points of law involved, and how many others have no interest or importance whatever. Apparently, the restriction of appeals to cases involving a large amount of property does not tend to limit them to cases involving important points of law. It really seems as if it were desirable that a discretion should be exercised in regard to what cases should be reported, rather than that the volumes should be filled with so much useless matter.

These two volumes are entitled "United States Reports;" and, although they are the first of a new series, they are numbered volumes 91 and 92. We believe that this title and arrangement were adopted in accordance with the wishes of the court, instead of designating the volumes, as heretofore, by the name of the reporter, — a practice which was convenient enough as regards the reports of the Supreme Court, though it was confusing when applied to the numerous State courts. The new title is not objectionable; but we are unable to see why these two volumes, which are volumes 1 and 2 of a new series, should be numbered 91 and 92. There never were any other reports called "United States Reports;" there never was, and is not now, any volume 89 or 90 of such reports. Why, then, should there now be volumes 91 and 92? There is no convenience in citing a volume of law reports by a high number; on the contrary, when a high number was attained, there would be a convenience in changing the name, or calling it "new series," so as to go back to a volume 1, and use small numbers again. As it is, if the plan of beginning with volume 91 is persisted in, we shall, in a very few years, be citing the volumes by the 100's, instead of postponing that event for fifty years. If, however, it has been determined that this new series shall not begin with a volume 1, still we are unable to perceive why it should begin with volume 91, in preference to any other number. Before these volumes, there have been but eighty-six volumes of regular reports of the decisions of the Supreme Court; namely, Cranch, 9; Wheaton, 12; Peters, 16; Howard, 24; Black, 2; Wallace, 23. Therefore, if all these had been called United States Reports, and had been numbered consecutively from the beginning, Mr. Otto's first volume would have been numbered volume 87. The 17th of Peters was prepared after he had ceased to be reporter, and belongs to the same time as the 1st of Howard. If the four volumes of Dallas were counted, they would make up the number of previous volumes to 90; but Dallas's Reports were not reports of the Supreme Court of the United States. The first volume contains only cases in the courts of Pennsylvania, from 1759 to 1789, before the Supreme Court of the United States was established; the three last volumes are reports of cases "in the several courts of the United States and Pennsylvania, held at the seat of the Federal Government." The cases in the Supreme Court of the United States occupy, in volume 2, only pages 399-480; in volume 3, pages 1-466; and, in volume 4, pages 1-46. Neither Dallas nor the 17th of Peters can with any propriety be deemed preceding volumes of a series of United States Reports. But, whatever system of naming and numbering is adopted, we must say, that there ought to be only one system. An opportunity ought not to be given for citing the same book as 91 U. S. and 1 Otto. The lettering of the back of the volume, as well as the title-page,

does give this opportunity. A useful substitute for the name and number on the second label would be the year of the reports; at the same time, it might be well to put on the back the name of the court, instead of the letters S. C.

The typography and general appearance of these volumes are good, and, except in the omission of the marginal titles of the cases, are an improvement on any that have gone before.

*Fraudulent Conveyances.* A Treatise upon Conveyances made by Debtors to defraud Creditors. By ORLANDO F. BUMP. Second Edition. New York : Baker, Voorhis, & Co. 1876.

IT is a melancholy commentary upon the honesty of the business community in England and in this country, that the materials for a work upon this subject should exist in such superabundance. We have before us a book of some seven hundred and fifty pages, devoted to the consideration of conveyances by debtors to defraud their creditors. That it was written by Mr. Bump would apparently be in itself a sufficient guaranty of its thoroughness and accuracy. We feel obliged, however, to express our disappointment in the author's treatment, both of his subject and of the profession. His want of method in his treatment of the former, and the constant repetitions, both in the text and notes, — the same cases being not uncommonly cited as many as ten, and sometimes as many as seventeen, times, — are serious blemishes in the work. Some of this repetition is undoubtedly due to the fact that many of the decisions cover more than one point; but too often it seems to be a careless waste of time and space. We notice, also, so great a diffuseness in the style, and the print is of so unusual a size, that we cannot help feeling that the work is intentionally made larger than is necessary. We may do the author injustice in this respect; but the professional man is now so nearly crushed by the mere *weight* of authorities, that we must protest against even the appearance of this evil. We know it is given but to few authors to be as concise and as accurate as the late Judge Metcalf; but, surely, some effort can be made to imitate him.

The most serious difficulties of such a work as the one before us are, in reality, the unsettled condition of the law itself, and the uncertainty arising from conflicting decisions. The author, in his preface, fully acknowledges this difficulty, and disarms criticism by his candid confession that, owing to the great diversity of judicial decisions, he cannot and does not pretend to say exactly what the law is. He proposes simply "to present to the reader a theory of the law in the text, and to cite all the authorities, so that each practitioner can tell at a glance whether any proposition is accepted in his own State." He further tells the reader that he does not expect that his views will be adopted by the courts, which are fallible, and confesses his own "fallibility." We cannot, with politeness, do less than agree with him.

The value of a work written upon such a plan depends almost wholly upon the care and thoroughness with which the author has selected his authorities from among the decisions of the highest courts in the different States. In looking through the cases quoted from those of the Supreme Court of Massachusetts, we are somewhat surprised to find that such a leading and well-known case as that of *Winchester v. Clark*, reported in 12 Allen, 605, is not noticed in the

volume, though we find that of *Winchester v. Charter*, reported in 102 Mass. 272, cited many times.

We look in vain for a clear and accurate statement of the present condition of the law with reference to that most common case of a voluntary settlement of his property by a husband upon his wife, for the purpose of defrauding his creditors. We find in his whole treatment of this subject of voluntary conveyances, that the author has shown in an unusual degree the characteristic diffuseness of the book.

In *Smith v. Vodge*, 2 Otto, 183, — which case, as reported in 13 Bankrupt Register, is cited by the author, — Judge Swayne says: "To defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene, the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable."

We have here the law in a nut-shell. Mr. Bump has devoted some thirty pages to this subject, and yet has not given us so explicit nor so complete a description of the actual state of the law.

As an example of Mr. Bump's diffuseness of style, we quote the following passage from Chapter IV., upon "Badges of Fraud," p. 54: "Relationship is not a badge of fraud. [Mr. Bump cites twelve cases to establish this statement!] Fraud, however, is generally accompanied with a secret trust; and hence the debtor must usually select a person in whom he can repose a secret confidence. The sentiments of affection commonly generate this confidence, and often prompt relatives to provide for each other at the expense of just creditors. They are the persons with whom a secret trust is likely to exist. Any relation which gives rise to confidence, though not a badge of fraud, strengthens the presumption that may arise from other circumstances, and serves to elucidate and explain or give color to the transaction." This is a sample brick of the stately edifice. We protest, in the name of a suffering profession, against such inflictions.

In an appendix, the author adds three cases from the Year Books (kindly translated for the benefit of the profession), and the statutes of Great Britain and of all the United States where statutes upon the subject of fraudulent conveyances have been enacted, printed *in extenso*. This is mere "padding," and it is worse than useless to encumber a work of this class with statutes of various States, which are constantly changing from year to year.

The index to the book is not a good one, and shows marks of great haste on the part of the compiler. The mechanical execution of the work is admirable.

*An Introduction to the Principles of Morals and Legislation.* By JEREMY BENTHAM, Esq., M.A., &c. Oxford: At the Clarendon Press. 1876.

If the publishers had anticipated a very extensive sale for this book, it is probable that they would have felt able to afford to give it a better dress. The paper, type, and binding are flattered if they are called indifferently good. But we fear that the booksellers are not to blame in this matter, and

are probably quite right in assuming that it is not safe to make a volume of Bentham's philosophy a financial luxury. It is the poor students who buy, read, digest, and interpret the wisdom of the distinguished sage. In good truth, it must be admitted that Bentham sadly needs an interpreter. However well he thought, he certainly wrote but poorly; and, if he mastered philosophical science, it was more than he could ever do for the English language. More involved, incomprehensible sentences never fell from the lips of the possessed Pythones; and the really great difficulty in studying Bentham is not so much to comprehend and appreciate his ideas, as to discover and drag them forth from the obscure recesses of his phraseology. This lack of lucidity in expression seems more peculiar in view of the directly contrary habit of his mind in other and more substantial matters. For the chief value of Bentham's teachings lies in their practical, plain sense; and his doctrines are, for the most part, as clear as they are profound.

The foundation of Bentham's philosophy is honesty, in thought, in word, and in fact. His mission was against deception, falsehood, humbug of every name and nature, and wheresoever it could be found. His was a downright sturdy mind, which needed not to have the rough edges and hard corners of facts smoothed and concealed. The pugilism of the ideal John Bull had got into his intellect. His enunciations of truth have such a solid air about them, that it seems as if they must have the qualities of solids, and possess a real length, breadth, and thickness. He builds or destroys an argument by fitting together or removing these logical cubes. As may be imagined of a man of such habits of thought, he is always in pursuit of some substantial and useful end. Reasoning and abstract investigation are not, with him, keen and ingenious weapons of fence, wherewith, by his display of adroitness, he may dazzle admiring throngs, and be urged to teach his clever passes to a few zealous disciples. The real improvement of the condition of mankind is always his purpose. He tries every idea and thought by the touchstones of fact and usefulness. It was this stern and rigid destruction of sham which made him so great an innovator and improver amid the older school of thinkers. Their clever technicalities and tricks of words were like cobwebs before his stiff and bristling broom. He deserves the distinguished praise of having taught abstract thinkers, philosophers, and such like, how to do *real* good to their fellow-men.

Mr. Mill calls Bentham the "great questioner of things established," and says, that, if "the hardest innovation is no longer scouted because it is an innovation, — establishments no longer considered sacred because they are establishments, — it will be found that those who have accustomed the public mind to these ideas have learnt them in Bentham's school, and that the assault on ancient institutions has been and is carried on for the most part with his weapons." The "field of practical abuses" was his peculiar province, and his function was to "carry the warfare against absurdity into things practical." But, greatly as Mill admired Bentham, he has yet applied to him some of the severest criticism to which Bentham was ever subjected. What he says of him amounts, simply, to this: that Bentham was one-half of a giant. Had it not been for this unfortunate deficiency of the *dimidium ipsius*, so to speak, Bentham would have been altogether the biggest giant that the world has

seen since the days of Plato, — perhaps might even have rivalled, in modern times, that noble antique. The truth is, that Bentham was accurate, but not comprehensive; that, with the materials furnished by his own mind, he could work admirably, but he could derive no assistance from the labors of other minds. He was altogether devoid of imagination; knew “little of human feelings,” and “still less of the influences by which those feelings are formed.” He could draw a conclusion from his premises very correctly, and in such shape as to be of practical service; but his “general conception of human nature and life furnished him with an unusual slender stock of premises.”

It cannot be denied that admirers and followers of Bentham are perpetually vexed by his failures and deficiencies. When he is great, he is so very great that they adore him; when he is small, he is so very small that their hearts ache with dread lest the world at large should measure him by his deficiencies. He wrote much which his disciples would be glad to have had him burn in the original manuscript. The book before us is, however, not of this description. Of all that he wrote, it is, perhaps, the most valuable, most practically useful, and most worthy of preservation. As every cultivated man must know and read something of Bentham, it is fortunate that this volume is again upon the booksellers' shelves, since it is, by all means, the best to read among his writings.

*A Treatise on the Law of Fixtures.* By MARSHALL D. EWELL. Chicago : Callaghan & Co. 1876.

THERE is, perhaps, no branch of law which is to-day so unsettled, and in which the decisions are so conflicting, as the Law of Fixtures; the conflict arising not so much from the ever-varying circumstances of the cases presented, as from different interpretations of the word *fixtures*, and consequent different constructions of law applicable to the subject.

So numerous are the decisions, and so utterly inconsistent and confused do they seem, that it is possible to find authorities to support either side of almost any given case; and he would be a bold man who should attempt from the heterogeneous mass of cases to deduce any fixed rule for universal guidance. Such an attempt was made by Archibald Brown, in his *Rule of the Law of Fixtures*, so called; though to ascertain exactly what this rule is, with its numerous divisions and subdivisions, its elements and subsidiary elements, and its exceptions, would require more time than a lawyer in active practice would care to devote to the subject.

This is the only recent text-book upon the law of fixtures. In the third edition, many of the American cases are cited, but not always with accuracy, and the book is by no means exhaustive. The subject, moreover, is treated in so argumentative and theoretical a manner, as to make the work of little value in practice.

The book before us, we doubt not, will prove an addition to the literature of this subject, equally welcome to the student and the practitioner.

Mr. Ewell, whom we do not know except as the author of an excellent compilation of cases on Infancy, Coverture, and Idiocy, recently published, has given us a model text-book. At a time when the ill-arranged and inaccurate results of hasty labor, often second-hand, are so frequently placed upon



the market, under the name of text-books, to the profit of the author rather than the profession, it is a pleasure to meet with a treatise so exhaustive in citations, and displaying such thorough and careful reading of the cases.

The date of each decision is given throughout the text and notes, and in the table of cases, — an example it would be well for the profession to follow in the preparation of briefs. In citing an English case, each report in which it is found is given. We should judge there were almost no inaccuracies of citation. *Bliss v. Whitney*, 9 Allen, 114, is cited on page 93 as 19 Allen, 114, — clearly a typographical error, since the case is cited correctly on pages 77 and 139. *Rex v. St. Nicholas*, 1 T. R. 723, n., is stated in the table and on page 36 as decided in 1782, on page 377 as in 1787, and on page 376 as in 1873. The case appears to have been decided in 1783; the last error is a misprint, and the others arise from taking the wrong date in the margin of the original report.

We mention these trivialities because they are the result of a careful test of a large number of citations, taken at random throughout the book, and prove how accurately the work is done. The cases commented upon in the text as leading are selected with much discrimination, and are those well known to the profession, and of acknowledged authority. There are a few chapters of little value to the lawyer of to-day, but which could not well have been omitted, perhaps, in a thorough presentation of the subject.

From a publisher's point of view, — in index, paper, type, margin, and binding, matters of no small importance, — the book is all that can be desired.

Mr. Ewell's treatise will prove an excellent text-book for the student, but especially useful to the practising lawyer, as a full and well-arranged compilation of cases too numerous and complicated for hasty research; it supplies a long-felt want, and will itself doubtless become a fixture.

*Cases argued and determined in the Circuit and District Courts of the United States for the Seventh Judicial Circuit.* By JOSIAH H. BISSELL, of the Chicago Bar, Official Reporter. Vol. VI. 1874-1876. Chicago: Callaghan & Co. 1876.

MR. BISSELL prints in this volume more decisions, in proportion to the number of cases, than his previous fashion of reporting had led us to expect. If we mistake not, there are only three charges to juries here reported. We have read the volume with care, and find it of more than ordinary interest and importance. In the matter of reporting, Mr. Bissell does creditable work, and in no instance crowds matter into a case for the mere purpose of book-making. If he will permit the criticism, we should say, that a little more pains to shorten and condense the head-notes, and to omit all that are not essential, would place him high on the list of good reporters.

Among the reported cases we notice *In Re National Life Ins. Co.*, p. 35, which holds that the amendment of Feb. 3, 1873, of the Bankrupt Law (U. S. Rev. Stats., sect. 5123), does not oust the jurisdiction of the bankruptcy courts over a corporation of which the State courts had appointed a receiver.

*Pereles v. City of Watertown*, p. 79, holds that the legislature are not the sole judges of what is a reasonable time, within which to limit the bringing

of actions on causes of action that have already accrued, and that their discretion in that regard is subject to review by the courts. It is accordingly held, in this case, that an act of the Wisconsin legislature, limiting the time for bringing actions on municipal bonds to one year, so far as it applies to such bonds issued before its passage for negotiation in a foreign market, is unreasonable and unconstitutional.

In *The Chicago & Northwestern R.R. Co. v. The Chicago & Pacific R.R. Co.*, p. 219, the court entertain a bill for an injunction brought by a consolidated corporation chartered by the States of Wisconsin and Illinois, against an Illinois corporation, and assert the power of a court of equity to prohibit a newly chartered railroad company from crossing an established one at grade, in the absence of any clear declaration of the legislature as to the mode of crossing, although it has been the policy of the legislature to permit, in most instances, grade crossings.

In *United States v. Rindskopf*, p. 259, we find this instructive head-note: "Many cases cited and commented upon."

In *Warren v. Wisconsin Valley R.R. Co.*, p. 425, the court hold jurisdiction over a suit for the assessment of damages caused by taking land for railroad purposes, in which the plaintiff, a non-resident land-owner, had removed his appeal from the commissioners' assessment of his damages from the State to the United States court; Hopkins, J., saying, in the opinion, that such a proceeding is a suit of a civil nature, in which a judgment may be rendered which concludes the parties, and that the remedies of the United States jurisdiction cannot be abridged or controlled by State legislation.

In *Hartford Fire Ins. Co. v. Doyle*, p. 461, the facts were these: The Wisconsin statute of March 14, 1870, providing that every non-resident insurance corporation should agree, as a condition of doing business in that State, not to remove cases to the Federal court for trial, was held unconstitutional by the Supreme Court of the United States, 20 Wall. 445. By a statute of April 5, 1872, it was made the duty of the Secretary of State of Wisconsin to revoke the license to do business in the State of any company that violated that agreement. *Held*, on a bill for an injunction against the Secretary of State to prevent the cancellation of plaintiff's license, that it could not be supposed that the State intended to annul a license, or prevent a company from doing business within its borders, except for the violation of some legal duty; and that, as the original statute had fallen, all the added penalties must fall with it. So an injunction against the Secretary of State was ordered.

In *re Sutherland*, p. 526, decides that a certificate of membership in the Chicago Board of Trade, which had a market value of some \$500, but which only entitled its purchaser to membership on the approval of two-thirds of the directors after ten days' notice, was not assets of the proprietor that would pass to his assignee in bankruptcy.

*A Treatise on the Law of Damages.* By GEORGE W. FIELD, Author of "A Treatise on the Powers, Duties, and Liabilities of County and Township Officers." Des Moines, Iowa: Mills & Co. 1876.

WE have been pleasurably disappointed in our perusal of this volume; for we had expected to find in it either a jejune digest of cases, or a discussion, in

the fashion of many modern law-books, of the elementary principles of the subject, suited rather for the use of students than for the profession. And we felt that our anticipations of the work could hardly be unjust to the author, from our belief that he could not have expected to supersede Mr. Sedgwick's work, and that, therefore, his treatise must have had a very different scope from that.

We believe, however, that, while the work will be found useful to the practising lawyer, from its logical arrangement and accurate citation of cases, it may serve in some degree a purpose even higher. It is essentially a book of American law, for, though the English cases are often cited and discussed, it is almost invariably upon subjects where the courts of different States are in conflict; and, as a book of American law, pointing out the differences in the reasonings of our various courts, and tracing as fully as possible the steps leading to these results, we think it will be valuable in its influence toward unanimity in judicial opinion among the courts of different States.

With courts of last resort in forty States, — all of which are daily adding to the common law of our country, and all of which are, ostensibly at least, engaged in the furtherance of justice, — it is eminently desirable that all should agree, as nearly as possible, in the principles by which the problems presented to them are to be solved, in order that they may co-operate as much as possible, and aid each other in reaching their results.

In the investigation of a point of law, novel in one's own State, it is distressing to find in all the other States only two decisions upon it, and these diametrically opposite to each other; and yet we believe that similar experiences are familiar to every practising lawyer. There are, of course, many questions decided in every court of appeal, which are so close, that the judgment may be as well one way as the other; but these are usually only questions of practice, of but little importance beyond the State in which they are decided, and beyond these there seems no good reason why, upon broad questions, there should be so much diversity of judicial opinion.

Laymen are fond of ridiculing the assumption of the law, that it is founded in reason, and can find support for their derision in the contradictory decisions of courts esteemed equally eminent, and all alike professing to rest upon purely logical principles.

Moreover, a suitor in the Kentucky court of appeals, who relies for his construction of a Kentucky statute upon a decision of the highest court of Iowa, in construing an Iowa statute identical in its language, is apt, upon his defeat in the former court, to arraign not only the intellect but the conscience of his tribunal, not without some show of reason; and the inevitable result is contempt, if not disregard, of courts, and law in general.

Beyond this, there are many branches of jurisprudence where the conflict of interstate decisions, if they may be so called, places suitors, counsel, and judges alike at disadvantage; these are, for example, the questions of the *lex fori* and the *lex loci*, and those of jurisdiction, upon which men are obliged almost daily to act in important matters, knowing but little of what their rights may be found to be, in the event of suits, except that the precedents are almost hopelessly at variance upon the points in issue in the courts of the different States to which they may have to appeal.

It is, of course, too much to hope that the decisions already reached in different courts upon the same point can now be changed, but we may reasonably expect, that, upon new questions, there may be some effort toward unanimity; and, in promoting this result, there is no agency more effectual than a good text-book, giving the latest cases of the different courts. Such a book affords the judges an opportunity to profit constantly by the labors of all their fellow-workers, and thus to avoid, in some measure, conflict of opinion.

Of course, every text-book necessarily serves this purpose to a greater or less extent; but many of those lately published in the Western States have been so exclusively adapted to their own codes and systems of practice, that they have been nearly valueless elsewhere.

Field on Damages, however, will be found more than ordinarily useful: it is a systematic statement of the work of all the American courts upon the comprehensive subject of which it treats; the style is easy and perspicuous, and the whole method and plan of the treatise is symmetrical and satisfactory.

The proof-reading has not been careful in some instances, and the printing and binding of the volume are hardly worthy of it.

*Outlines of an International Code.* By DAVID DUDLEY FIELD. Second Edition. New York: Baker, Voorhis, & Co.; London: Trübner & Co. 1876.

MR. FIELD belongs to what, we believe, is called the "advanced school" of international jurists, to which we have more than once said we were unable to give our unqualified adhesion.<sup>1</sup> But, however much we may differ from him in many respects, we cannot withhold our admiration of the contribution he has here made to the literature of his subject. In the preface to the first edition, he explains that, at the meeting of the British Association for the Promotion of Social Science, in 1866, a committee of scholars of different nations was appointed to prepare the outlines of a code, with a view of ultimately forming a complete code to be presented to the attention of governments, in the hope of its receiving, at some time, their sanction. And, in performing his duty as one of this committee, he has thought it best to draw up these "outlines" of what has seemed to him the proper code to be reported to the committee for revision and correction. In doing this, he has, in fact, made a hand-book for ambassadors as well as for students; but he has, none the less, done his work in the manner best calculated to aid his committee in theirs.

The plan of the work is to state accurately each proposed ordinance in short sections, and then to give notes, — brief or copious, as the case requires, — indicating that the law is settled, where the section in question sets forth what has long been considered as belonging to the class of universal usages, such as public agents may feel safe in acting upon; or, where there is more or less doubt and dispute (as in the far greater number of instances), the opinions of jurists, the treaties of nations, and the writings of statesmen throwing light upon the question at issue.

We cannot conceive of a better plan, nor of any plan of the kind better

<sup>1</sup> Am. Law Rev. vol. ix. pp. 181-605; vol. x. pp. 189-219.

executed. And nothing could more clearly point out the different degrees of authority of the various dogmas and doctrines which are called international law, or the changes proposed and advocated by the author. We cannot entertain a very sanguine hope of the practical results of these studies in any near future, however valuable they may be, when we remember the recent absorption of Hamburg and Hanover by Prussia, and consider how small an improvement it indicates upon the conduct of the tribe of Dan, who, some three thousand years ago, massacred the people of Laish, for two simple reasons: (1) that they were "dwelling carelessly, after the manner of the Sidonians, quiet and secure;" and (2) that the tribe of Dan had need of their lands. And, in considering what are the sanctions of the international law now existing, we cannot forget the coolness with which Austria and Prussia, in the face of treaties to which England and France were parties, robbed Denmark of Schleswig and Holstein, nor the *sang-froid* which distinguished the action of Prussia in appropriating to her own use the whole of the "swag" — if we may use what, we are told, is the phrase of private persons who are accustomed to actions resembling these of the princes of Germany.

The note by the author (in the appendix) on the subject of "The Applicability of International Law to Oriental Nations," is very valuable and interesting.

In speaking of the necessity of mixed courts (including, for instance, a European consul), he tells us of the proceedings of an unmixed court, as follows: "I have myself seen accused persons brought up for trial before a Chinese judge. Each one was brought in with a chain around his neck, the end of which was fastened to a heavy stone that he was obliged to lift when he moved. On entering the judge's presence, he sank upon his hands and feet, and remained so during the trial, scarcely daring to look up; a crowd of retainers surrounded the judge, and took part in the trial, interrupting him, suggesting questions and making statements; and when the poor creature dared deny the charge, he was instantly put to the torture by men in waiting, who seemed as much part of the court as the judge himself;" and he adds: "The punishments inflicted in all Oriental nations are strange and cruel, — crucifixion being often among them. It would be revolting to subject our countrymen to such an ordeal, and the chance of such a punishment." We would gladly make further extracts, did our limits permit.

But, while we have only praise for the work of the author, we cannot so much admire that of the publishers. The indexical headings of every title are sufficiently copious, and are all given, not only in their proper places, but again in the form of "An Analysis of the Contents," occupying forty-five pages out of the seven hundred and twelve in the whole book. There are also thirty-nine pages of index, of which we by no means complain; but the two complements of an analytical index ought to have been combined. In fact, the winged words are heavily weighted with unnecessary emblazonment. The several introductions which some brief sections obtain occupy probably much more space than the sections themselves. But we will not trouble ourselves further about "padding."

*A Treatise on the Law of Executions in Civil Cases.* By ABRAHAM CLARK FREEMAN. San Francisco: Sumner Whitney & Co. 1876.

THE question, whether a new law-book is necessary on the topic treated of by Mr. Freeman, is met by him in a very modest and candid manner in his preface. We are quite sure, from our examination of his work, that the profession will give its commendation to his effort, and an unquestionable preference over any competitor.

A treatise on a topic based so largely on statutory law is certainly open, in theory, to serious objections. It does not rest on principles, but on arbitrary legislation; which is, moreover, changing year by year. The subject would seem, therefore, insusceptible of treatment by development of principles, and a literal and exact detail of the interpretation of the statutes the only method possible. Much, also, of what is essential or useful in any one of the forty jurisdictions which an American text-book must include, would be of little or no application in the others.

But these difficulties are more apparent than real, and by no means cover the whole question. In the first place, there is much greater uniformity in legislation than would be imagined by one who had not examined the State statutes minutely. Executions, moreover, had their substantial features well settled at common law, and legislation has only qualified or enlarged their application or procedure; while the decisions of the courts have, in defining, largely harmonized the rules relative to them.

It is, moreover, of great utility to a practitioner to find the law of a remote jurisdiction well and fully stated not only as to statutes, but as to their interpretation and extent. The value of a claim, when pursued beyond the limits of his own State, is a practical question, which he cannot well wait to learn slowly and doubtfully from foreign digests, — even if accessible, — or from a business correspondent at the risk of a week's delay.

But more than all, the coherent and intelligent *résumé* of the statutory law of foreign jurisdictions and its interpretation is of great value to the legislature and to the bar, from whom the legislature receives the law on questions of this character. A well-digested treatise on a subject like remedies or process, mesne or final, may and must have a powerful influence in the direction of uniformity of legislation.

All this depends, however, on the faithfulness and ability with which the text-writer does his work. To produce these results, he must do real, original work. He must observe at the same moment the opposite requirements of literal fidelity to statute law, and a broad comprehension of the development of general principles.

This success, we think, Mr. Freeman has achieved. His statements are perspicuous and forcible, and show that his propositions were carefully matured before statement. The whole work is one of marked ability.

The details of the book give evidence, also, of conscientious labor. The citation of cases is full, neat, and methodical, and the index compact, but complete. In the use of head-lines, both in the text and index, of larger type, a great assistance is given for rapid consultation of the book.

We presume the plan of the treatise did not permit it, in the author's view, but we should have been glad had Chap. XXXI. contained an examina-

tion of the Massachusetts Poor-Debtor Law. We may also advert to a typographical blemish which mars the page at the conclusion of Chap. XXX., for which, however, the printer is doubtless responsible.

*Reports of Cases argued and determined in the Supreme Court of Alabama*, during January Term, 1875, and a part of June Term, 1875. By THOMAS G. JONES, State Reporter. Vol. LII. Montgomery, Ala.: published by Joel White. New York: Hurd & Houghton. Cambridge: The Riverside Press. 1876.

THE official life of the Alabama reporter seems to be short. Less than a year ago we were called upon to chronicle the advent of Mr. Shepherd, who began his official labors with the 49th Alabama, and now we find that his mantle has already fallen upon Mr. Jones. Our brethren in the South are gradually becoming accustomed to sudden changes of rulers and laws, and we suppose neither courts nor reporters are wholly exempt from the revolutionary influence. We are glad to believe that Mr. Jones is no unworthy successor of Mr. Shepherd. The latter seemed to us a good reporter; and we observe that his methods are preserved in the volume before us, in which we see little to criticise, except the head-notes. These, we are satisfied, might be condensed; and we should like them better if they dealt more with the case, and less with abstract principles deduced from the decision by the reporter. On this subject, however, we preach so often, that we forbear, lest from too constant repetition our sermon may grow tedious.

The volume contains few cases of interest. A large number are criminal cases, and the frequency with which verdicts of guilty in cases of homicide are set aside shows that in Alabama, as elsewhere, "it is almost impossible to commit murder according to law." It is, perhaps, encouraging to discover that two persons were convicted of illegal voting, — one minor and one "repeater," — as it indicates a desire in the community at large for a fair count; but it is disappointing to find that neither conviction could be sustained, for the setting aside of such verdicts tends to weaken that respect for the law against such practices, which does not seem at present exceptionally strong, and which needs to be fostered by the court.

A large number of the civil cases turn on questions of practice and local law, and few are of any interest to the profession at large.

*Parks v. Coffey*, p. 32, decides that the State government of Alabama, during the rebellion, was "a rightful *de jure* government," and that judgments of the courts in ordinary civil cases were valid and binding; and in *Whitfield v. Riddle*, p. 467, it is held that a loan of Confederate money, during the same period, was a good consideration for a promissory note. Both these decisions are in conflict with previous decisions of the same court, rendered by the predecessors of the present judges, and are to be taken as overruling them.

*Luke v. Calhoun County*, p. 115, was an action against a county by a widow whose husband had been murdered by disguised persons, to recover \$5,000, under the provisions of an "Act to suppress murder, lynching, and assaults and batteries." The existence of such a statute is a curious example of the way in which history repeats itself; and the verdict for the defendant, rendered by a jury of the vicinage, suggests a doubt whether the legislators

were wise in departing from the Norman precedent, by leaving the inhabitants of the county a voice as to the collection of the penalty. In this case, the court followed the rule laid down in *Udderzook's Case*, and held that a photograph was competent evidence to prove the identity of the husband and the murdered man, if supported by the evidence that it was a good likeness of the husband. It is curious to compare the title of the act considered by the court in *Moses v. The Mayor of Mobile*, p. 198, with its provisions. It was entitled "An Act to establish the Mobile Charitable Association for the benefit of the common-school fund, without distinction of color." It, in fact, authorized one Moses and others to form a partnership for the purpose of establishing a lottery, and gave them the privilege for ten years, upon condition that they paid one thousand dollars annually to the Board of School Commissioners of Mobile County. We are not surprised that the court held the law unconstitutional, on the ground that its subject was not clearly expressed in the title.

There are several other cases which we are tempted to mention, but they suggest reflections more pertinent to questions of social science than of law, and their value as precedents will not outlast the disturbed condition of society which gave them birth.

*A Digest of the Law of Insurance*; being an Analysis of Fire, Marine, Life, and Accident Insurance Cases, adjudicated in the Courts of England, Ireland, Scotland, the United States of America, and Canada, commencing with the earliest reported adjudications, and continued to the present time. By OLIVER B. SANBURN, Counsellor-at-Law, Chicago, Ill. (late of the Island of Barbadoes, British West Indies). Chicago: Callaghan & Co., Law Publishers. 1876.

THIS is a good book, well planned and well executed, and it will, we are sure, be welcomed cordially. In these days, when the digests belonging to the different series of reports are almost as numerous as the volumes of reports themselves were a century ago, the literature of the law is fast becoming a pathless wilderness, and even a tolerably complete library is a luxury which few can afford. New methods of compression are indispensable, unless the exhaustive examination of a question is to cost either client or counsel more than depends on the answer, and none has been devised which meets the practical requirements of the profession so well as a digest like the one before us. A single volume containing all the decisions upon any branch of the law, well analyzed and arranged, with proper cross-references and a full index, is the most effective tool which a practising lawyer can have. In a text-book we find the conclusion which the author has reached after examining the cases; in the digest we find the cases themselves, and can form our own conclusions. Which is the safer and more satisfactory, no lawyer can doubt; for there are few who cannot recall some broad generalization of a text-writer, which proved, on examination, to rest on a very slender foundation of authority. In the digest, moreover, all the cases are gathered; while, in the text-book, the author cites decisions enough to sustain his proposition, without aiming to cite all. Whether, therefore, to find a place on the shelves of the lawyer's office as a book of reference, or to serve as an index to the contents of a library, the topical digest is becoming daily more and more essential to the profession.

We are glad that the task of digesting the cases on so important a branch



as the law of insurance has fallen into such competent hands as Mr. Sansum's. We have examined his work with some care, and have tested it in the investigation of questions arising in our own practice, and are satisfied that it is done with accuracy and fidelity. The arrangement of the work and the classification of the cases are good. The decisions themselves are stated tersely and with clearness, and the method of statement adopted is to give the facts in each case first, and then the court's ruling. We have always advocated this method, and we are satisfied that no one can examine this digest without recognizing its advantages. If Mr. Sansum, after the manner of many reporters, had given us merely a series of abstract propositions deduced by him from the cases cited, we should have had a digest of his conclusions, and not a digest of decisions. We have not found a single instance where the author's statement is diffuse or obscure, and but a single case where compression has been carried too far. No one can mistake the meaning of the following note, but it reads peculiarly: "Stipulated 'to be void, if the person whose life is insured shall die by suicide.' *Held*, plaintiff could not be permitted to show that at the time he killed himself he was insane, and was impelled to the act by insanity. *Cooper v. Massachusetts Life Ins. Co.*, 102 Mass. 227." Several well-known principles might be quoted in support of this decision.

We gladly recommend the book, and trust that Mr. Sansum will, at some future day, lay the profession under further obligations, by publishing a digest of some other branch of the law.

*The Law of Private Corporations*; being the Law of Private Corporations under the Civil Code of California, with the recent Amendments and Statutes; and Annotations in reference to the Decisions of the Supreme Court of California and of other States on analogous provisions; also an introductory chapter on the History of Private Corporations, and an Appendix, with Forms. By JOHN PROFFATT, LL.B., Author of "Curiosities and Law of Wills," "Jury Trial," &c. San Francisco: A. L. Bancroft & Co. 1876.

BUT little can be added, by even the most accurate reviewer, to the commendable statement of this title-page. It certainly furnishes to our readers more than an inkling of the contents of the book; and, to that extent, has made our labor easy. The Code of California treats all corporations alike; its provisions are general, uniform, and all-embracing; even those bodies called *quasi* corporations elsewhere find themselves welcomed to full communion in the corporate brotherhood in this State; "and here," says our author proudly, "as in other instances, California will be in the vanguard of jurisprudence." The book before us is, in short, the statute of California, with annotations which are full and rich in authorities. The author prefaces the work with an interesting chapter on the history of corporations, in which he treats of the *Dartmouth College Case*, and predicts, as to the so-called "Granger cases," that the Supreme Court will decide the Potter Act of Wisconsin unconstitutional.

We should think this little book would be well worth having, — even to use as a digest; for, although not pretending to give all the decisions, yet, as the cases given are appended to the sections of the law to which they relate, and as the index is a full one, it does offer in convenient form material not easily obtainable elsewhere.

*Reports of Cases decided in the Supreme Court of the State of Oregon, from December Term, 1873, to December Term, 1875.* C. B. BELLINGER, Reporter. Vol. V. San Francisco: A. L. Bancroft & Co. 1876.

THIS volume of reports is well printed, as reports go, but not so handsomely as we could wish. The reporter's work is, to our mind, done better than that of the court; for, although we find some cases where the conclusions of the court are tersely stated, the tendency is to diffuseness and to a recitation of unnecessary facts. We sympathize with the reporter in his endeavor to make satisfactory head-notes to some of the opinions contained in this volume.

*Pitman v. Bump*, p. 17, decides that a statute limiting the time for bringing an action of *crim. con.* to two years after the cause of action accrued, does not apply to those causes of action that accrued before its passage.

In *State v. Bruce*, p. 68, the court refuse to entertain a motion in arrest of judgment based on the insufficiency of the indictment, after verdict, on an indictment charging illegal voting, although the defendant was not apprised of the nature of the offence charged, and the indictment would have been quashed on motion.

*Holladay v. Patterson*, p. 177, decides that an action cannot be maintained to recover the amount of a subscription which the defendant in writing agreed to pay the plaintiff, if the depot of a railroad company of which the plaintiff was president was located in a certain place. The decision is based on, and is similar to that in, *Fuller v. Dame*, 18 Pick. 472, holding such contracts to be against public policy.

*State v. Dustin*, p. 375, was a complaint to have the respondent judged ineligible to the office of county judge, and to have him ousted therefrom. It was averred that the respondent induced seventy voters to vote for him at the June election, 1874, upon the promise that, if elected, he would pay two hundred dollars per annum from his salary into the county treasury of Grant County. But the court held the complaint bad, because there was no averment that any of the seventy voters were tax-payers, or would be beneficially interested by the promised payment into the county treasury. The court, however, take occasion to pay their respects in no mild terms to the judge who thus undertook to purchase his office.

We had marked other cases for notice, but our space restricts us.

*Notes, Historical and Bibliographical, on the Laws of New Hampshire.* By ALBERT H. HOYT.

THIS is a neat pamphlet of nineteen pages, reprinted, with additions, from the "Proceedings of the American Antiquarian Society" for April, 1876, and gives a concise account of the various codes adopted in New Hampshire, from the one framed by the first General Assembly of the royal province in 1680, to the present General Statutes of 1867. The author seems to have been painstaking and substantially accurate in his research. But the following statement would doubtless be corrected by him, upon examination:—

"Among the laws enacted in 1718 was one that authorized the judge of probate for the province to license executors and administrators to sell so much of the realty as was necessary to pay the debts and legacies. By this

great step forward New Hampshire anticipated the action of Massachusetts in this matter nearly one hundred years." p. 19.

This is calculated to give the impression that the real estate of deceased persons was not made liable for their debts and legacies, in Massachusetts, till nearly a century later than in New Hampshire, while, in fact, the legislation of Massachusetts on this subject was twenty-six years before that of New Hampshire.

The history of the first Massachusetts legislation on this point is a curious illustration of how jealously the English crown guarded its rights in the colonies. In 1692 the colonial legislature passed an act making real estate liable for the owner's debts, and providing for its sale, upon order of court, after his death, to pay his debts and legacies. Province Laws, 1692-93, c. 29. This act was wholly repealed by the Privy Council in England, Aug. 22, 1695, because it made no provision for first securing the debts due to the crown; and, in 1696, the legislature re-enacted the law, with the following proviso: "Provided, nevertheless, that any debt or debts due to the crown from any such estate shall be first secured, and paid out of the same." Province Laws, 1696, c. 10.

These acts gave the power to order sale to the Superior Court. In 1783 the power was also given to the Court of Common Pleas for the county where the deceased last lived; and, in 1817, the same power was given to the probate courts of the various counties, subject to appeal to the Superior Court.

Mr. Hoyt's work will be of value to all students of the written law of New Hampshire, and we hope it will suggest to some competent person the preparation of a similar sketch of the laws of Massachusetts.

*Supplement to Riddle's Treatise on the Law and Practice of Supplementary Proceedings*, adapted for use in all the States and Territories. By JOHN F. BAKER, Author of a "Treatise on the Law of Corporations," &c. New York: Diossy & Co. 1877.

THIS book is intended, as we are informed by the preface, to present the changes in the law regulating proceedings supplementary to execution since 1866, when Mr. Riddle's treatise was published, together with "a résumé of all the adjudications upon the principal and collateral subjects deemed of general interest to the profession;" and it is said to contain, also, "a careful review of the decisions of the several States which have the same or similar laws to those of New York." We cannot say that it will not possess a certain value to the bar of the latter State. To the changes in its statute law and the decisions of its various courts, the author devotes three-fourths of his space. For what use in other States or in the Territories it is adapted, the title-page does not inform us; and we have been unable, without its assistance, to discover. Certainly, no lawyer in either of them could consult it on any question arising under its law with the least advantage. In his discussion of Ohio law, which occupies less than a page, Mr. Baker cites no case later than 11 Ohio St.; under Maine, nothing later than 51 Me.; under New Jersey and Delaware he cites no cases: and these States fare no worse than many of their sisters. After an examination of the book, we are forced to the conclusion, either that there are no States "which have the same or

similar laws to those of New York," or that in such States there have been few "decisions." The ambitious title-page and preface constitute a brilliant opening; but the evidence does not support it.

*A Treatise upon the United States Courts and their Practice*; explaining the Enactments by which they are controlled, their organization and powers, their peculiar jurisdiction, and the modes of pleading and procedure in them; with numerous practical forms. By BENJAMIN VAUGHAN ABBOTT. Third Edition. Rewritten and corrected conformably to the Revised Statutes and Recent Decisions. Vol. I. Enactments; Organization; Jurisdiction. New York: Ward & Peloubet, successors to Diossy & Co. 1877.

WITH the general character of "Abbott's Practice" the profession is already familiar, and its value is shown by the demand for the book, which this new edition is intended to supply. The changes in the law of the United States, caused by the revision of the statutes, have rendered necessary considerable alterations; and for the present edition the work has to a great extent been re-written. The changes in the rules of court are given; the decisions, rendered since the book first appeared, have been examined, and are cited; and, as now presented, the book is intended to be a complete and reliable manual of practice under the present law. Mr. Abbott's well-earned reputation for honest and faithful work leaves little room for doubt that the labor which he undertook has been well performed.

## A LIST OF LAW BOOKS PUBLISHED IN ENGLAND AND AMERICA SINCE OCTOBER, 1876.

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- Abbott, Benjamin Vaughan. *A Treatise upon the United States Courts, and their Practice.* Third edition. Vol. 1. 8vo, sheep, \$7.50. Ward & Peloubet, New York.
- Alabama Reports. Vol. 52. (Jones.) 8vo, sheep, \$6.50. Joel White, Montgomery.
- Aldred, Philip Foster. *Elementary Questions on the Law of Property, Real and Personal; supplemented by Advanced Questions on the Law of Contracts.* Post 8vo, cloth, 6s. Simpkin, Marshall, & Co., London.
- Arkansas Reports. Vol. 29. (Moore.) 8vo, sheep, \$6.00. Callaghan & Co., Chicago.
- Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation.* 12mo, cloth, 6s. 6d. Clarendon Press, Oxford.
- Boyd, A. C. *The Merchant Shipping Laws.* 8vo, cloth, 25s. Stevens & Sons, London.
- Brooke, Richard. *Treatise on the Office and Practice of a Notary of England.* Edited by Leone Levi. 8vo, cloth, 28s. Stevens & Sons, London.
- Bump, Orlando F. *Fraudulent Conveyances. A Treatise upon Conveyances made by Debtors to defraud Creditors.* Second edition. 8vo, sheep, \$7.50. Baker, Voorhis, & Co., New York.
- Bump, Orlando F. *The Law and Practice of Bankruptcy.* Ninth edition, revised and enlarged. 8vo, sheep, \$7.50. Baker, Voorhis, & Co., New York.
- Chaney, Henry A. *Digest of the Michigan Reports, Vols. 22 to 33. A supplement to Cooley's Digest of 1872.* Royal 8vo, sheep, \$5.00. Detroit.
- Charley, Wm. T. *Real Property Acts, 1874, 1875, and 1876.* Third edition. 12mo, cloth, 12s. Henry Sweet, London.
- Coe, W. E. *Practice at the Judges' Chambers, &c., under the Supreme Court of Judicature Acts of 1873 and 1875.* Post 8vo, cloth, 10s. Henry Sweet, London.
- Creasy, Sir Edward S. *First Platform of International Law.* 8vo, cloth, 21s. John Van Voorst, London.
- Davidson's *Precedents, and Forms in Conveyancing.* Third edition. Vol. 5, part 1. Royal 8vo, cloth, 28s. Maxwell, London.
- Erskine, Lord. *Speeches, while at the Bar.* Edited by James L. High. 4 vols. 8vo, cloth, \$12. Callaghan & Co., Chicago.
- Essays in Anglo-Saxon Law,* by Henry Adams, H. Cabot Lodge, Ernest Young, and J. Laurence Laughlin. 8vo, cloth, \$4. Little, Brown, & Co., Boston.
- Ewell, Marshall D. *A Treatise on the Law of Fixtures.* 8vo, sheep, \$7.50. Callaghan & Co., Chicago.
- Field, David Dudley. *Outlines of an International Code.* Second edition. 8vo, sheep, \$7.50. Baker, Voorhis, & Co., New York.
- Field, George W. *A Treatise on the Law of Damages.* 8vo, sheep, \$6.50. Mills & Co., Des Moines.
- Fisher, Wm. Richards. *The Law of Mortgage and other Securities upon Property.* Third edition. 2 vols. Royal 8vo, cloth, 60s. Butterworths, London.

- Georgia Reports. Vol. 55. (Jackson.) 8vo, sheep, \$7.00. J. W. Burke & Co., Macon.
- Goodeve, J. M. An Abstract of reported Cases relating to Letters-Patent for Inventions. Royal 8vo, cloth, 18s. Henry Sweet, London.
- Greenleaf, Simon, LL.D. A Treatise on the Law of Evidence. Thirteenth edition, carefully revised, with large additions. By John Wilder May. Vols. 2 and 3. 8vo, sheep, \$12.00. Little, Brown, & Co., Boston.
- Haines, Elijah M. A Practical Treatise on the Powers and Duties of Justices of the Peace and Police Magistrates. Seventh edition. 8vo, sheep, \$7.00. E. B. Myers, Chicago.
- Howell, George. Handy Book of the Labour Laws. Second edition, revised. 8vo. cloth, 2s. 6d. London.
- Hubbell's Legal Directory. 1876-77. 8vo, sheep, \$5.00. J. H. Hubbell, New York.
- Illinois Reports. Vols. 69, 75, and 78. (Freeman.) Each, 8vo, sheep, \$5.50. Springfield.
- Indemaur, John. Principles of the Common Law: An elementary work intended for the use of Students and the Profession. 8vo, cloth, 20s. Stevens & Haynes, London.
- Indemaur, John. Self-Preparation for the Final Examination. Second edition, 8vo, cloth, 4s. Stevens & Haynes, London.
- Indiana Reports. Vol. 52. (Black.) 8vo, sheep, \$4.50. Indianapolis.
- Iowa Reports. Vol. 41. (Runnells.) 8vo, sheep, \$5.00. Mills & Co., Des Moines.
- Jones, James. A Compendium of Forms, with the Mode of Procedure in the Various Courts of the State of Illinois. Fourth edition. 8vo, sheep, \$5.00. E. B. Myers, Chicago.
- Kansas Reports. Vols. 15 and 16. (Webb.) Each, 8vo, sheep, \$6.00. Geo. W. Martin, Topeka.
- McLennan, John Ferguson. Studies in Ancient History, comprising a Reprint of Primitive Marriage. An Inquiry into the Origin of the Form of Capture in Marriage Ceremonies. Crown 8vo, cloth. 12s. Bernard Quaritch, London.
- Massachusetts Reports. Vol. 119. (Lathrop.) 8vo, sheep. H. O. Houghton & Co., Cambridge.
- Mears, T. L. Analysis of M. Ortolan's Institutes of Justinian, including Roman Law. Post 8vo, 12s. 6d. Stevens & Sons, London.
- Mell, P. H. Manual of Parliamentary Practice. New and thoroughly revised edition. 16mo, cloth, 75 cents. Sheldon & Co., New York.
- Missouri Reports. Vol. 62. (Post.) 8vo, sheep, \$4.50. W. J. Gilbert, St. Louis.
- Mitford, John. A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill. Supplemented by Notes, &c., on United States Practice, by Samuel Tyler, LL.D. 8vo, sheep, \$7.50. Baker, Voorhis, & Co., New York.
- New Jersey Law Reports. Vol. 38. (Vroom, Vol. 9.) 8vo, sheep, \$6.00. Trenton.
- New York Court of Appeals Reports. Vol. 62. (Sickels.) 8vo, sheep, \$2.00. A. Bleecker Banks, Albany.
- New York Reports. Howard's Practice. Vol. 51. 8vo, sheep, \$4.50. William Gould & Son, Albany.
- Oregon Reports. Vol. 5. (Bellinger.) 8vo, sheep, \$6.00. A. L. Bancroft & Co., San Francisco.
- Paterson, W. The Practical Statutes of the Session, 1876. (39 & 40 Victoria.) 12mo, cloth, 12s. 6d. London.
- Pemberton, L. L. The Judgments and Orders of the Court of Appeal and High Court of Justice. Second edition. Royal 8vo, cloth, 50s. Stevens & Haynes, London.

- Pennsylvania Reports. Vol. 79. (Smith.) 8vo, sheep, \$4.50. Kay & Brother, Philadelphia.
- Pike, L. O. A History of Crime in England. Vol. 2. 8vo, cloth, 18s. Smith, Elder, & Co., London.
- Proffatt, John. A Treatise on Trial by Jury, including Questions of Law and Fact. With an Introductory Chapter on the Origin and History of Jury Trial. 8vo, sheep, \$7.50. Sumner Whitney & Co., San Francisco.
- Robson, G. Y. A Treatise on the Law of Bankruptcy. Third edition. 8vo, cloth, 38s. Butterworths, London.
- Sansum, Oliver B. A Digest of the Law of Insurance; being an Analysis of Fire, Marine, Life, and Accident Insurance Cases. Royal 8vo, sheep, \$8.00. Callaghan & Co., Chicago.
- Stephen, James Fitzjames. A Digest of the Law of Evidence. 16mo, leatherette, \$1.50. Soule, Thomas, & Wentworth, St. Louis.
- Stone, Samuel. The Justice's Manual. Eighteenth edition. Post 8vo, cloth, 21s. Shaw & Sons, London.
- Smith's Elementary View of the Proceedings in an Action at Law. Twelfth edition. Post 8vo, cloth, 10s. 6d. Stevens & Sons, London.
- Thomas, Ernest C. Leading Cases in Constitutional Law. 8vo, cloth, 6s. Stevens & Haynes, London.
- United States Circuit Court Reports. Seventh Circuit. Bissell, Vol. 6. 8vo, sheep, \$7.50. Callaghan & Co., Chicago.
- United States Circuit Court Reports. Fifth Circuit. Woods, Vol. 2. 8vo, sheep, \$7.50. Callaghan & Co., Chicago.
- United States Supreme Court Reports. Wallace, Vol. 23. 8vo, sheep, \$5.00. W. H. & O. H. Morrison, Washington.
- United States Supreme Court Reports. Vol. 91. Cases argued and adjudged in the Supreme Court of the United States. October Term, 1875. Reported by William T. Otto. Vol. 1. 8vo, sheep, \$5.00. Little, Brown, & Co., Boston.
- United States Supreme Court Reports. Vol. 92. Cases argued and adjudged in the Supreme Court of the United States. October Term, 1875. Reported by William T. Otto. Vol. 2. 8vo, sheep, \$5.00. Little, Brown, & Co., Boston.
- United States Statutes passed at the First Session of the Forty-fourth Congress, 1875-76, and Recent Treaties, Postal Conventions, and Executive Proclamations. Royal 8vo, paper, \$1.00. Washington.
- Wait, Wm. Digest of New York Reports. 1872-76. Vol. 5. Being the Second Supplement to Clinton & Wait's Digest. 8vo, sheep, \$6.50. William Gould & Son, Albany.

## SUMMARY OF EVENTS.

## UNITED STATES.

**THE PRESIDENTIAL ELECTION.** — The closeness of the late election for President bids fair to subject the Constitution to the severest strain it has yet felt. The main question, of course, is, who, if anybody, is entitled to pass upon the qualification and election of the electors. A number of collateral questions have arisen, and the whole matter has been much discussed. With the reassembling of Congress, however, a genuine effort seems to be making to ascertain the facts in the disputed cases, to collect the precedents and examine the law, and generally to get together the material for a proper discussion, and, it is to be hoped, settlement of the matter. We propose, therefore, for the present, to do no more than indicate our opinion on the main question.

The provision of the Constitution (art. ii. sect. 2), regarding the appointment of electors, is, —

“Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.”

The method of ascertaining the choice of the electors themselves is provided for by art. xii. of the amendments to the Constitution: —

“The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed.”

It seems to us that the opinion of Chancellor Kent, as to how the vote should be counted, is the true one; namely, that the President of the Senate “counts the votes and determines the result, and that the two houses are present only as spectators, to witness the fairness and accuracy of the transaction, and to act only if no choice be made by the electors.”

To give the body upon which devolves the duty of choosing a President, in case of a failure to elect by the Electoral College, the right to inquire into the qualifications or returns of the electors, will end in surrendering to it wholly the right of choosing the President, and the Electoral College will become a more unsubstantial thing, if possible, than it is now. The members of the college have already abdicated their right of individual opinion; they may cease even to be the mouth-pieces of the popular will.

The question has several times come up, but never, we believe, under circumstances where the answer would change the general result, until the elec-



tion of 1864. At the session of Congress immediately after that date a joint resolution was passed, as follows:—

“Whereas, the inhabitants and local authorities of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee, rebelled against the government of the United States, and have continued in a state of armed rebellion against the government of the United States for more than three years; and were in a state of armed rebellion on the eighth day of November, 1864; therefore, the States mentioned in the preamble are not entitled to vote in the Electoral College for the choice of President and Vice-President of the United States for the term commencing on the 4th of March, 1865; and that no electoral votes shall be received or counted from those States concerning the choice of President and Vice-President for that term.”

This was sent to the President, and returned by him, signed, with the following letter:—

*“To the Honorable Senate and House of Representatives:* The joint resolution, entitled ‘Joint Resolution,’ declaring certain States not entitled to representation in the Electoral College, has been signed by the Executive, in deference to the view of Congress, implied in its passage and presentation to him. In his own view, however, the two houses of Congress, convened under the twelfth article of the amendments to the Constitution, have complete power to exclude from counting all electoral votes deemed by them illegal, and it is not competent for the Executive to obstruct that power by a veto, as would be the case if his action was at all essential in the matter. He disclaims all right of the Executive to interfere in any way in the matter of canvassing or counting the electoral votes, and he also disclaims that, by signing said resolution, he has expressed any opinion on the recital of the preamble, or any judgment of his own upon the subject of the resolution. ABRAHAM LINCOLN.

“Executive Mansion, Feb. 8, 1865.”

During the canvass in 1868 (July 20), another joint resolution was passed by Congress:—

*“Resolved,* that none of the States whose inhabitants were lately in rebellion shall be entitled to representation in the Electoral College for choice of President and Vice-President of the United States, nor shall any electoral votes be received or counted from any such States, unless, at the time prescribed by law for the choice of electors, the people of such States, pursuant to the act of Congress in that behalf, shall have, since the 4th of March, 1867, adopted a constitution of State government, under which a State government shall have been organized, and shall be in operation; nor unless such election of electors shall have been held under the authority of such constitution and government, and such State shall also have become entitled to representation in Congress, pursuant to the act of Congress in that behalf: *Provided,* that nothing contained herein shall be construed to apply to any State which was represented in Congress on the 4th of March, 1867.”

This resolution was vetoed by President Johnson, who said that, —

“The mode and manner of counting the electoral vote was prescribed by the Constitution. That the instrument imperatively requires that the President of the Senate shall, in the presence of the Senate and House, open all the certificates, and the votes shall then be counted. Congress has therefore no power to receive or reject them. The whole power of Congress is exhausted, when, in the presence of the two houses, the votes are counted, and the result declared. . . . Being fully satisfied

that the States were never out of the Union, and that their relations thereto have been legally and constitutionally restored, I am forced to the conclusion, that the joint resolution which deprives them of the right to have their vote for President and Vice-President received and counted is in conflict with the Constitution, and that Congress has no more right to reject their votes, than those of the States which have been uniformly loyal to the Federal Union."

The resolve, however, was passed over the veto. Again: in the count in 1872 three votes cast for Greeley by Georgia were thrown out, and the votes of Louisiana and Arkansas were not counted. The two houses agreeing that there had been no fair election in Arkansas, and disagreeing as to whether there had been such an election in Louisiana, the votes of both States were rejected.

We are inclined to think with President Johnson. The power of choosing its own electors, and of prescribing the manner in which they shall be chosen, is vested by the Constitution in each State; and the State which fixes the method of choice must have the power of determining who is chosen. It is an essential part of the power to choose. The decision of the tribunal, — be it court or returning board, — which the State has clothed with authority to determine in the last resort who has been elected, is final, and Congress has no power to reverse it, or reject the votes cast by the persons whom such a tribunal has declared electors. It is obvious, however, that a case may easily arise, — if, indeed, it has not already arisen, — in which, through the want of such power in Congress, the will of the nation may be defeated by the fraud of an individual, and that some change in our system must be made. We sincerely hope that no such change will be made until the subject has been carefully considered, in the light, indeed, of our recent experience, but not until the angry feelings excited by it have subsided. The great danger is, that one or the other political party, taking counsel of its passions and not of its reason, may establish, by a species of force, a precedent fraught with ruinous consequences to the Republic.

MR. BLAINE AND MR. JUSTICE CLIFFORD. — The recent presidential canvass has been characterized by more personal abuse than any within our remembrance. Men of high official position and wide reputation seemed to vie with each other in attacking the personal characters and past lives of candidates for office, and those who had offended them by expressing political preferences distasteful to the speakers. There were many exceptions, indeed; and, before the election took place, some of those guilty of such unwarrantable attacks were forced to admit, that, on the whole, these weapons had done more injury to the men using them, than to those against whom they were directed. We should not allude to the subject at all, were it not that the most false, wanton, and truculent attack of the whole campaign — one without a semblance of foundation — was that made by Mr. Blaine, one of the senators from Maine, upon the venerable Mr. Justice Clifford of the Supreme Court.

On the 18th of September, in a speech in Boston, Mr. Blaine, in speaking of the famous "Southern Claims," made the following reference to a case recently decided by Judges Clifford and Clark, in the United States Circuit Court at Portland: —

"There was a provision of law, that these claims should be paid only to loyal men; but that has been set aside. You have no idea of the extent of those claims. If you examine the claims for mules alone, you will wonder how the rebel army found stamping-ground between the Potomac and the Gulf. It was only two days ago that a judgment was reaffirmed in the United States Circuit Court in Portland against General Neal Dow, for sugar seized by him in Louisiana for the use of his soldiers."

A few days afterwards, having reached Warren, Ohio, he spoke, according to the report in the *New York Tribune*, as follows:—

"And now, gentlemen, more startling than any thing else, on Thursday of last week there was a decision rendered in the city of Portland, State of Maine, in the United States Circuit Court, Judge Nathan Clifford presiding, with Daniel Clark, District Judge of New Hampshire, sitting with him,—and I want the attention of the lawyers again,—confirming the judgment obtained against Neal Dow, of the Thirteenth Maine Regiment in Louisiana, giving judgment to the rebel against Dow personally for the sugar seized on his plantation by a foraging party from his regiment. They were out foraging, and seized some sugar, and the man sued for it, and Dow said, 'If you are a loyal man, we will give you a receipt, and you will easily get your pay for it.' Now, the sugar was used, and a large part of it sent to the hospitals. Dow says, 'If you will show me your loyalty, I will give you a receipt;' and he declined to do it, and got judgment in a Louisiana court. The United States Circuit Court at Portland confirmed that judgment, and ordered execution to issue for \$1,750. That being so, I say, gentlemen, will it not enable the man that owned the field at Appomattox to collect ground-rent from Grant for the occupancy of it, and destruction of the fences and crops? There has never been so menacing a cloud as this hanging over a free people. More than that, this decision was warmly dissented from by Judge Clark, of New Hampshire. He was brought up in the true faith; but the Supreme Court overruled him, in the person of Clifford. Clifford is an ingrain, hungry democrat, double-dyed and twisted,—dyed in the wool, and coarse wool at that. And, in my judgment, he has carried that case for eight years, and never offered that decision until he, in his ignorance, believed in a democratic triumph. If there should be a democratic dreamer here, will not that gentleman tell me why any solitary battalion or division of the army in the South cannot be sued for every article of trespass?"

On seeing the report of Mr. Blaine's Boston speech, Judge Clark wrote him the following letter:—

"MANCHESTER, N. H., Sept. 22, 1876.

"MY DEAR MR. BLAINE,—My attention has been called to a passage of your speech at Boston, in which you refer to a suit against Neal Dow, recently heard by Judge Clifford and myself at Portland.

"Your statement of the case is substantially correct, and forcibly illustrates the danger to be apprehended from these Southern war claims; and yet it may do injustice to Judge Clifford, by leaving an impression that he is in favor of paying such claims. I hardly think this is so; and no such inference can be drawn from his conduct or decision in this case. He heard the case, in the first instance, sitting alone. Neither Judge Shepley nor Judge Fox could sit with him. He had the case a long time under advisement, it presenting a question of great national importance and of fine pleading. He did not wish to decide it alone, and it could in only one way be carried to the Supreme Court, to wit, a certificate of difference between two judges, because, the amount being about \$1,700, it could not go up on writ of error. To enable

the parties, therefore, if they wish, to take the case to the Supreme Court, he sent for me to come and sit with him, and sign the certificate of difference, as I did.

"One great difficulty in the case is, General Dow let a judgment go by default in a court recognized by Judge Shepley while military governor of New Orleans; and that judgment is now sued here. The judgment is conclusive, if the court had jurisdiction, and the court was one recognized by the military governor, and its process was duly served on General Dow.

"The case is one of difficulty, but I am certain Judge Clifford is anxious it should be decided right.

Yours truly,

"DANIEL CLARK."

This letter, it seems, did not reach Mr. Blaine until after his Warren speech. Proving as it did how mistaken he had been (partly, perhaps, from not being a lawyer) in the character of the suit, and what gross injustice had been done to a member of the highest tribunal in the land, an ample apology and expression of regret was the least he could do to set himself right in the opinion of gentlemen, and to show that, although unmeasured in the use of language when in the heat of a canvass, he desired to do injustice to no one. Had he done this, the matter would soon have been forgotten. Certainly we should not now be noticing it. On the contrary, Mr. Blaine wrote a letter, which, for levity and insolence, has seldom been surpassed, and only aggravated the insult of which he had been guilty. Like other men who use abuse as a political weapon, Mr. Blaine is rather thin-skinned himself, and he keenly resented some rather strong language which Mr. Bion Bradbury, a prominent lawyer of Maine, who had been of counsel in the case, had used, under the mistake of supposing that Mr. Blaine had received Judge Clark's letter before his Warren speech. We print his defence in full:—

"TOLEDO, Oct. 5.

"To the Editor of the Toledo Blade:

"I observe in the Cincinnati *Enquirer* of yesterday a letter from Bion Bradbury, Esq., an attorney-at-law of Portland, Me., in regard to the decision of Judge Clifford, of the United States Supreme Court, in the now famous *Neal Dow Case*. Mr. Bradbury is counsel for the plaintiff in that suit, is fully committed to all its dangerous doctrines, and is well known in Maine as one of the most rancorous and uncompromising of partisan democrats. He is a fair and full type of the men whom the loyal republican sentiment of the North will have to fight to the bitter end on all questions of this kind. Only two or three points of Mr. Bradbury's letter require my attention, and I am compelled to write 'on the wing,' and, of course, very hastily.

"Mr. Bradbury intimates that I have had in my possession, ever since my Boston speech of Sept. 18, a letter from Judge Clark, of New Hampshire, who sat with Judge Clifford, and dissented from his opinion. The inference Mr. Bradbury desires the public to draw, is, that I have concealed or withheld Judge Clark's letter all that time. The truth is, Judge Clark's letter was not written till Sept. 22, mailed the 23d, and has been following me from point to point, and finally reached me at Cincinnati three days since. The letter is as follows, and I give it *verbatim et literatim*. [Here he quotes Judge Clark's letter in full.]

"It will be observed that Judge Clark frankly says that my 'statement of the case was substantially correct,' and, further, that it 'forcibly illustrates the danger to be apprehended from these Southern war claims.' These remarks of Judge Clark sufficiently answer Mr. Bradbury's ill-tempered, ill-mannered, untruthful assertions respecting the main point at issue.

"I am not responsible for the report of my speech at Warren, as quoted by Mr. Bradbury. I never saw the reporter's notes, and never read the extract quoted by Mr. Bradbury until I saw it in his letter. But it was assuredly reported incorrectly. I certainly never dreamed of calling Judge Clifford 'a hungry democrat.' I am too familiar with the Judge's well-fed and portly dimensions to apply to him any such absurd characterization. Neither did I reflect on his personal or official integrity. On the contrary, I state that one of the most alarming features of the decision was, that Judge Clifford belonged to that guarded, twisted, ingrained, incurable school of Bourbon democracy that honestly believes in just such dangerous and destructive doctrines as are covered by this decision.

"Mr. Bradbury says that the only point involved in Judge Clifford's decision was the question of jurisdiction of the Louisiana court. Precisely! The Louisiana court gave judgment against a colonel of the Union army for property seized and appropriated by a foraging squad of the regiment; judgment taken by default, Colonel Dow being with his command in the field, utterly unable to respond to a summons, and certainly not dreaming that civil suits could be brought in the country of the insurgents against officers of the invading army of the Union.

"I have always stated the case with accuracy, and neither Judge Clifford nor Mr. Bradbury can show why every other officer of the Union army may not, in like manner, be sued for all the property which his command may have seized and appropriated during the four years of the rebellion. Judge Clifford's decision is far worse than if it sustained a suit brought since the war, for it distinctly recognizes, if it does not affirm, that while the war was actually going on, *flagrante bello*, an officer of the Union army was bound, at whatever peril it might be to the Union cause, to leave his command when summoned by a local court in the heart of a rebellious country. And Judge Clifford, without looking at the facts which notoriously surrounded the case,—nay, shutting his eyes to these facts, when it required a great effort to close them,—recognizes the jurisdiction of a Louisiana court to interfere, at the very crisis of the war, with the operations of the Union army.

"Judge Clark says: 'Judge Clifford has had the case a long time under advisement, it presenting a case of grave national importance.' The 'long time' referred to by Judge Clark covers, at least, eight years, I am told. It is not for me to say that Judge Clifford has not had good reasons for withholding his opinion this 'long time,' but it cannot fail to strike the country, that the decision is promulgated just at the time that Judge Clark thinks there is 'danger to be apprehended from these Southern war claims.' I have no right to comment on Judge Clifford's motives, and do not assume to judge them; but I have a perfect right to discuss the mood and sense of his remarkable opinion. And the danger concealed under that opinion is greatly enhanced by the reported expression of the democratic candidate for the Presidency, that 'every soldier who marched across Southern soil was a trespasser, and liable to suit for damages in an action for trespass.' Ex-Governor Underwood, of Vermont, declares that Mr. Tilden made this identical declaration to him during the war.

"The dangers to which I called attention, as exemplified by Judge Clifford's opinion, were substantially these,—

"1. That an army officer can be sued and compelled by judgment of court to pay for property seized by him or his soldiers at the South during the war.

"2. That in such a suit, by decision of the Supreme Court touching cotton cases before the Court of Claims, no proof whatever can be required that the plaintiff was not a rebel, but that he may recover without such proof.

"3. That such a suit may be brought and judgment recovered in any Southern State court, and then the judgment sued in a United States court at the North, and

the judgment affirmed and the officer compelled to pay by the process of the United States court.

"No answer has been made to any of these points by Mr. Bradbury. He says that Bradish Johnson, the plaintiff, was in fact loyal; but he does not assert that any such fact was proved, or that Judge Clifford's opinion makes any distinction whatever between a loyal citizen and a rebel. And this point illustrates the very danger I have been trying to point out, and most forcibly presents the rapid progress we are making toward paying Southern claims, regardless of the loyalty of the claimant.

"With the republican party in force, the United States treasury is safe from the frightful raid now impending over it. But what, I ask, may be apprehended from a democratic Congress, a democratic President, and democratic judges?

"The passage of one short law, covering only three points, would bankrupt the United States government, and destroy our public credit. Those points are, —

"*First*, That no proof of loyalty of any claimant before the Southern Claims Commission, now in session, or before any department of the government other than that required by the United States Supreme Court in suits at law; i.e., no proof at all.

"*Second*, That the Statutes of Limitation shall not apply in case of any war claims otherwise allowable against any individual or against the United States. If there be any question of law about the power to revive a claim against an individual, once barred by statute of limitation, there is certainly none as to the power of the government to revive it as against itself; and that is the point principally affecting the United States treasury and the loyal tax-payers of the country.

"*Third*, That 'reasonable compensation may be recovered by all citizens of the United States for the use and occupation of their property by the United States army, or any part thereof, during the late civil war;' and in these words I am but quoting the language of a bill now pending in the United States House of Representatives, introduced by a democrat, and under consideration by the democratic judiciary committee, to whom it was referred in February last, and who did not report it back to the House, but held it for consideration until after the presidential election. Why did they not report adversely upon it, promptly and decidedly?

"The courteous tone in which Judge Clark refers to his belief in Judge Clifford's intention to do right belongs to the amenities of the bench; and with these I am not dealing at present. I only see that Judge Clifford did not agree with Judge Clark, and end, as he might, then and there, all dangerous claims of this character. I only see that Judge Clifford's great influence on the Supreme bench, based on his long service and his learning in the law, has all been thrown on the Southern, or rebel, side of this mighty question. In short, in the very language of Judge Clark, I only see that the case 'fully illustrates the danger to be apprehended from these Southern war claims.' And, seeing and believing these things, I have exposed them wherever I have spoken, and shall continue to do so to the end of the presidential campaign.

Very respectfully,

"J. G. BLAINE."

As we said before, Mr. Blaine, not being a professional man, is not expected to understand technical law or the mysteries of legal procedure. Still we cannot believe that a man of his unquestioned ability did not understand Judge Clark's explanation, and, after reading that, failed to see that no question of Southern claims was really involved in the decision. As Mr. Blaine evidently thinks it the duty of a judge to decide such cases as these without regard to the legal rights of the parties, we cannot expect him to see or appreciate the delicacy of Judge Clifford's action, finding that the case was one of great im-

portance, in calling in another judge in order to give General Dow the benefit of the ultimate decision of the Supreme Court. But criticism of the letter is superfluous. It is speaking mildly to use, in respect of Mr. Blaine, the words that he applies to Mr. Bradbury, and to say that the attack is "ill-tempered, ill-mannered, untruthful." We have regretted extremely to see how partisanship has caused many gentlemen, who would themselves have cut out their tongues before they would have been guilty of such a breach of good manners and honorable conduct, to look with indulgence upon Mr. Blaine's offence, and to class it with the ordinary vehemence of political canvassing. Even *Harper's Weekly*, edited by one of the most amiable and thorough gentlemen in the country, simply regrets Mr. Blaine's language, and reserves most of its censure for Mr. Bradbury.

The liability that judges are subject to, of having their motives impugned when deciding cases involving political questions, is exemplified by this correspondence, and shows the serious danger which would attend the imposition of any more political duties on the courts. And we take this opportunity of protesting against the proposal introduced by Mr. Edmunds into the Senate, but happily rejected, of an amendment to the Constitution, giving the duty of counting the electoral vote to the Supreme Court. A more alarming proposition we never heard. The duties of a canvasser of votes are, in our opinion, incompatible with those of a judge of a high court, and their union would go a great way towards destroying the respect felt for the judiciary, while even the decision of the court would fail to satisfy the defeated party in any disputed election. That some change in the Constitution is required, both as to the mode of electing President and of counting the votes, is very apparent; but we should rather have things as they are, than drag the judiciary into such controversies.

THE BANKRUPT LAW. — THE STATE AND THE FEDERAL COURTS. — *Clafin, Plaintiff in Error, v. Houseman, Assignee*. — UNITED STATES SUPREME COURT. (In error to the Supreme Court of the State of New York). — A question of much importance, — namely, whether an assignee in bankruptcy, under the Bankrupt Act of 1867, may sue in the State courts, — has now been settled by the decision in this case. Houseman, as assignee in bankruptcy, brought suit in the State court in 1872, against Clafin, to recover a certain sum collected by Clafin on a judgment against the bankrupts, recovered within four months before the beginning of proceedings in bankruptcy. The ground of the action was, that the bankrupts had suffered judgment to go by default, with intent to prefer Clafin, when they were insolvent, and that, therefore, the judgment was, in fraud of the bankrupt law. The defendant below demurred to the complaint, on the grounds: first, that "the court had no jurisdiction of the subject of the action;" and, second, that "the complaint did not state facts sufficient to constitute a cause of action." The plaintiff had judgment in the State court. The Supreme Court, in its opinion (Mr. Justice BRADLEY), says: —

"The point principally relied on by the plaintiff in error is, that an assignee in bankruptcy cannot sue in the State courts. It is argued that the cause of action arises purely and solely out of the provisions of an act of Congress, and can only be prosecuted in the courts of the United States, the State courts having no jurisdiction over the subject. It is but recently settled that the several District and

Circuit Courts of the United States have jurisdiction, under the bankrupt law, of causes arising out of proceedings in bankruptcy pending in other districts. There had been much doubt on the subject, but it was finally settled at the last term of this court in favor of the jurisdiction. *Lathrop v. Drake*, 91 U. S. Rep. 516. Had the decision been otherwise, — as for a long period was generally supposed to be the law, — assignees in bankruptcy, if the position of the plaintiff in error is correct, would have been utterly without remedy, to collect the assets of the bankrupt in districts other than that in which the bankruptcy proceedings were pending. Neither the State courts nor the Federal courts could have entertained jurisdiction. The Revised Statutes, whether inadvertently or not, have made the jurisdiction of the United States courts exclusive in ‘all matters and proceedings in bankruptcy.’ Sect. 711. Whether this regulation will or will not affect the cognizance of plenary actions and suit, it is not necessary now to determine. At all events, the question of such cognizance must be met in this case, and, being important in the principles involved, would require much deliberate consideration, had it not been already in effect decided by the court.

“In the opinion of the court in *Lathrop v. Drake*, it was taken for granted, and stated, that the State courts had jurisdiction (p. 518); but, as the question was not directly involved in that case, it was more fully considered in *Eyster v. Gaff*, 91 U. S. Rep. 521, and it was there decided that a State court is not deprived of jurisdiction of a case by the bankruptcy of the defendant, but may proceed to judgment without noticing the bankruptcy proceedings, if the assignee does not cause his appearance to be entered, or proceed against him if he does appear. If there were any thing in the Constitution to incapacitate the State courts from taking cognizance of causes after the bankruptcy of the parties, as the constitutional argument of the plaintiff in error supposes, the proceedings in bankruptcy would, *ipso facto*, determine them. But on this subject, in *Eyster v. Gaff*, the court say: ‘It is a mistake to suppose that the bankrupt law avoids, of its own force, all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition.’ Again: ‘The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of actions, conferred a jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent with, and does not divest that of, the State courts.’ pp. 525, 526.

“The same conclusion has been reached in other courts, both Federal and State, which hold that the State courts have concurrent jurisdiction with the United States courts of actions and suits in which a bankrupt or his assignee is a party. See *Somson v. Burton*, 4 Bank. Reg. 1; *Payson v. Dietz*, 8 id. 193; *Gilbert v. Priest*, id. 159; *Stevens v. Mechanics’ Savings Bank*, 101 Mass. 109; *Cook v. Whipple*, 55 N. Y. 150; *Brown v. Hall*, 7 Bush, 66; *Mays v. Man. Nat. Bank*, 64 Penn. 74. There are contrary cases, it is true, as *Brigham v. Claffin*, 81 Wis. 607; *Voorhees v. Frisbie*, 25 Mich. 476, and others; but we think that the former cases are founded on the better reason.

“The assignee, by the fourteenth section of the Bankrupt Act (R. S., sect. 5046), becomes invested with all the bankrupt’s rights of action for property, and actions arising from contract, or the unlawful taking or detention of or injury to property, and a right to sue for the same. The actions which lie in such cases are common-law actions, ejectment, trespass, trover, assumpsit, debt, &c., or suits in equity. Of these actions and suits the State courts have cognizance. Why should not an as-



signee have power to bring them in those courts as well as other persons? Aliens and foreign corporations may bring them. The assignee simply derives his title through a law of the United States. Should not that title be respected by the State courts?"

After considering some other analogous cases, the opinion proceeds : —

"The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises, sometimes with a leaning in one direction, and sometimes in the other; but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction where it is not excluded by express provision, or by incompatibility in its exercise, arising from the nature of the particular case.

"When we consider the structure and true relations of the Federal and State governments, there is really no just foundation for excluding the State courts from all such jurisdiction.

"The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State, — concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights, and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts competent to decide rights of the like character and class, subject, however, to this qualification, — that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. See remarks of Mr. Justice Field in *The Moses Taylor*, 4 Wall. 429; and Story, J., in *Martin v. Hunter's Lessee*, 1 Wheat. 334; and of Mr. Justice Swayne in *Ex parte McNeil*, 13 Wall. 236. This jurisdiction is sometimes exclusive by express enactment, and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and Federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

"It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney in

the case of *Ableman v. Booth*, 21 How. 506.; and hence the State courts have no power to revise the action of the Federal courts, nor the Federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied. . . .

"The case of *Teal v. Felton* was a suit brought in the State court of New York against a postmaster for neglect of duty to deliver a newspaper under the postal laws of the United States. The action was sustained by both the Supreme Court and Court of Appeals of New York, and their decision was affirmed by this court. 1 Comst. 587; 12 How. 292. We do not see why this case is not decisive of the very question under consideration.

"Without discussing the subject further, it is sufficient to say, that we hold that the assignee in bankruptcy, under the Bankrupt Act of 1867, as it stood before the revision, had authority to bring a suit in the State courts wherever those courts were invested with appropriate jurisdiction, suited to the nature of the case."

**WOMEN AS LAWYERS.** — The application of Mrs. Belva A. Lockwood, for admission to practise as an attorney of the Supreme Court, has been denied. When the matter came up, Nov. 6, the Chief Justice said he had been instructed by the court to announce the following decision: —

"By the uniform practice of the court, from its organization to the present time, and by the fair construction of its rules, none but men are admitted to practise before it as attorneys and counsellors. This is in accordance with immemorial usage in England, and the law and practice in all the States until within a recent period; and the court does not feel called upon to make a change, until such a change is required by statute, or a more extended practice in the highest courts of the States."

It was stated in behalf of Mrs. Lockwood, that she had practised at the bar of the Supreme Court of the district for more than three years, and was, therefore, in that respect within the rule of the court.

**EXTRADITION. — TWEED'S CASE.** — Tweed, who was arrested by the Spanish government at Vigo, a port in Spain, and surrendered to the United States authorities, has at last reached this country in the *Franklin*. As there exists no extradition treaty between the United States and Spain, the surrender is, of course, an act of comity only. As such, it may be worth the attention of those who seem to think that a government acquires the right to surrender a fugitive from justice only by negotiating a treaty for that purpose.

As Tweed, however, had escaped from arrest in a civil suit simply, it seems to us that "comity" has been pushed to its extreme limit. We doubt very much the wisdom of assuming the obligations that so dangerous a precedent may impose on our government.

## ILLINOIS.

**THE** trial of Sullivan for the killing of Hanford — the facts of which are, doubtless, fresh in the minds of our readers — has been followed by a most extraordinary piece of silliness. It seems that popular feeling was much excited by the circumstances of the affair, and that, naturally, Judge McAllister,

who presided at the trial, did not in his rulings come up to what the popular mind believed the law was, or, at any rate, ought to be, for this particular case. The Judge leaned, or was supposed to lean, too strongly to the side of mercy; and in the course of the trial, which was a long and excited one, he seems, in fact, once or twice to have made remarks which, probably, he himself, on reflection, would consider ill-judged. The jury disagreed. When the news of this result became known at the "board of trade, business was practically suspended, and the members engaged in discussion of the case." Imagine a capital case of the most extreme difficulty and the greatest nicety, as this was, managed by a board of trade in committee of the whole. A public meeting of the citizens was held, and the result of it all was, that "a document was prepared," asking the Judge to resign. This paper received some 8,000 signatures, and was presented to the Judge by a committee of the citizens, headed by a Mr. Ham. What the people can do, however, when they seriously take a matter in hand, is, perhaps, best shown by the address with which the petition was presented. That "document" is as follows:—

"JUDGE McALLISTER,—The committee of gentlemen here present were chosen at a public meeting of citizens of this county to perform a certain service in the cause of the people, and I have been selected to speak in behalf of the committee. The duty with the performance of which the members of the committee are charged, is, personally, a painful one. But it is of a public nature; it devolves upon them in the capacity of citizens; they may not, therefore, shrink from its performance; and as their judgment and conscience approve the object, they accept the responsibility without hesitation. Among the fundamental rights guaranteed to the people of free governments, there is none more sacredly cherished than the right of petition. About the great right of petition the shield of the Constitution of the nation and of the State is thrown. The national Constitution declares that 'Congress shall make no law . . . abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances.' And the constitution of the State declares that 'the people have a right to assemble in a peaceable manner . . . to make known their opinions to their representatives, and to apply for a redress of grievances.' In pursuance of this great constitutional right we are here; and now, in the name of the committee, I present to you, William K. McAllister, Judge of the Circuit Court of Cook County, the petition—the respectful petition—of 8,000 citizens of the county, praying your resignation of the high office lately conferred upon you by the suffrage of the people."

The Judge seems to have had the courage to witness unmoved the spectacle of Mr. Ham, with the "shield of the Constitution of the nation and of the State" thrown around him, unusual as it must be to him to see a man so panoplied.

Seriously, we hope the Judge will give the petition all the attention it is entitled to,—his quiet disregard.

We are sorry to add that the Chicago Bar Association seems to have lost its head for a time, though wiser counsels finally prevailed. Indeed, so far as we can make out, the association was not unanimous in opinion whether any mistakes in law had been made at the trial. And, granting that there had been mistakes, one prominent speaker thought it "was pretty late to begin to take up blunders;" to which we venture to add, that, late or early, it would be absurd and mischievous for the association to attempt to erect itself into a court of errors and appeals.

We express no opinion as to the merits of the case. But we feel sure that the interests of the State, the rights of the prisoner, and the general administration of justice, can receive nothing but harm from such proceedings as we have described.

### MAINE.

**CONSTITUTIONAL LAW.**—**VAGRANT.**—*City of Portland v. City of Bangor.* It is provided by the statutes of this State, that two or more overseers of the poor of any town or city may, by writing under their hands, commit to the workhouse "all persons able of body to work, and not having estate or means otherwise to maintain themselves, who refuse or neglect so to do; and all such as lead a dissolute, vagrant life, and exercise no ordinary calling or lawful business sufficient to gain an honest livelihood." It was decided in *Nott's Case* (11 Me. 208), that this provision did not violate the State constitution; and in *Portland v. Bangor* (42 Me. 403), that the expenses incurred by any city or town in the support of such persons while confined in the workhouse were "pauper supplies," and might be recovered as such of the city or town where such persons had their settlements. In the present case, the plaintiffs had committed to their workhouse under the above provision of statute one Ray, whose settlement was in Bangor, and now sued for the expense of her support. The Supreme Court, however, say:—

"If such an arbitrary exercise of power violates no provision of our State constitution, it very clearly violates the Fourteenth Amendment of the Federal Constitution. That article declares that no State shall deprive any person of life, liberty, or property, without due process of law; and, while it may not be easy to determine in advance what will in every case constitute due process of law, it needs no argument to prove that an *ex parte* determination of two overseers of the poor is not such process. *Dunn v. Burleigh*, 62 Me. 24.

"If white men and women may be thus summarily disposed of at the North, of course black ones may be disposed of in the same way at the South; and thus the very evil which it was particularly the object of the Fourteenth Amendment to eradicate will still exist.

"The objection to such a proceeding does not lie in the fact that the persons named may be restrained of their liberty, but in allowing it to be done without first having a judicial investigation to ascertain whether the charges made against them are true. Not in committing them to the workhouse, but in doing it without first giving them an opportunity to be heard.

"If the decisions in *Nott's Case* and in *Portland v. Bangor* were correct when made, the power therein sanctioned can be exercised no longer. It is abrogated by the Fourteenth Amendment of the Federal Constitution, and was, at the time when the proceedings on which this action is founded were had. The proceedings being illegal, the action cannot be maintained."

### MASSACHUSETTS.

**THE BOYLSTON BANK ROBBERY.**—**GLOVER'S PARDON.**—We cut from the *Boston Transcript* the following:—

"Through the persistent efforts of a sister of the prisoner, and Mrs. Wilson, a city missionary of New York, William A. Glover, who was sentenced to the Massa-

chusetts State prison, March 31, 1874, for twelve years, for being accessory before the fact in breaking, entering, and stealing from the Boylston Bank in this city, in January, 1869, has obtained his freedom. The Committee on Pardons of the Executive Council have had the matter before them at various times during the last six months, and on Thursday virtually decided to grant a pardon, on the ground of the innocence of the prisoner. The documents for the release of Glover were not, however, issued until yesterday afternoon. The pardon was received at the prison about half-past one o'clock, at which time two lady-friends of Glover were in waiting, and welcomed him as he came forth from his cell, attired in his citizen's dress, and accompanied him to the home of his sister, who is connected with a highly respectable family in Brooklyn, N. Y. During his imprisonment Glover has obeyed the rules of the institution, and, as superintendent of the laundry department, he has always discharged his duties faithfully. The grounds upon which the pardon was issued are set forth in the following

#### REPORT OF THE COMMITTEE.

"The Committee on Pardons, to whom was referred the application of William A. Glover, submit the following report:—

"Said Glover was convicted of complicity in the robbery of the Boylston Bank, which occurred in November, 1869. He was arrested in New York, May 19, 1871, and brought to Boston, where he was confined in Suffolk county jail till August in the same year, when he was tried before a jury, who disagreed, and he was thereupon remanded to jail, where he remained till January, 1872, when he was again tried, convicted as above, and sentenced to the State prison for the term of twelve years. He has been confined in all about five and a half years. The only witness against Glover at both trials was Thomas H. Pratt, who had been released from the New York City Tombs that he might testify against him. At the second trial there was some evidence, independent of Pratt, that Glover had something to do with the stolen property, and was, therefore, accessory after the fact, which evidence, in addition to and corroborative of the testimony of Pratt, resulted in a conviction.

"It was proved, and Glover has never denied, that some of his business associates were criminals, and that some of his business transactions were dishonest; but he has always asserted his innocence of the crime for which he is suffering imprisonment, and his belief that Pratt was actuated by revenge in testifying against him, as well as by the hope of himself escaping imprisonment and obtaining a pecuniary reward.

"An unsuccessful effort was made to obtain for Glover a new trial, on the ground that Pratt's testimony was false, according to his own admission. The district-attorney who tried the case for the government admits that Glover could not have been convicted without the testimony of Pratt, and also admits that the application for a new trial would have been successful had the testimony of a Mrs. Wilson, relative to her conversations with Pratt and his admissions to her, been believed and accepted as true.

"The papers in this case indicate that the prisoner was convicted of being accessory *before* the fact by evidence, such as it was, that he was accessory after the fact. Glover is about thirty-five years of age, and his business was that of a broker and dealer in diamonds, jewelry, &c. There was nothing in his childhood and boyhood that pointed to his present condition. While his business brought him in contact with disreputable persons, there is evidence that he sustained a fair reputation, enjoyed a good credit, and was not regarded as belonging to the criminal class. There is abundant evidence that Pratt is a thoroughly bad character, and that he might have been, and probably was, actuated by the motives attributed to him in

testifying against Glover. He is said to be serving a sentence in a penitentiary for crimes committed since the conviction of Glover, and 'he is wanted' by Boston detectives for swindling operations committed here.

"There is proof, beyond a reasonable doubt, that Rev. Mrs. Wilson, whose testimony was relied upon to obtain a new trial, is a lady of intelligence and good character, and entitled to entire confidence. She testifies, that, while she was visiting the Tombs in the capacity of a city missionary, she became acquainted with Pratt, who on one occasion informed her that she would not see him there again, as he had a scheme to obtain his release. She next heard of him as a witness, upon whose testimony Glover was convicted. She next met him on the street, when he displayed money which he had for going to Boston as a witness against Glover. Subsequently, in her own house, when Pratt called with another man, who had been the recipient of kindness in prison, he confessed to her that his testimony at the trial of Glover was 'false in every essential particular;' and assigned as a reason for his action 'a grudge against Glover,' whom he had now 'paid off.'

"In September, 1874, one Bullard, who had just returned from France, was arrested in New York, upon the charge of robbing the Boylston Bank; and he is now serving a long sentence in our State prison for his participation in that crime. He declared to the detectives who arrested him, and now declares, that only three men besides himself were concerned, — one of whom is dead, one is in the Pennsylvania penitentiary, and one a fugitive from justice. He never heard of William A. Glover until he heard of his conviction, and he is sure he had no knowledge of the crime before it was committed, and no guilty knowledge of it afterward. Bullard's story was believed by the detectives who arrested him, and is believed also by one or both of the officers who arrested Glover. It may be stated, in this connection, that our State prison officials, who have seen much of Glover as well as Bullard during the last few years, are satisfied that Glover had no knowledge of the robbery before it occurred, and did not knowingly, if at all, handle any of the stolen securities.

"The committee admit that there is much force in the objections to the pardon of Glover that are set forth in the report of the district-attorney; but it may be said, in reply thereto, that, at the time of Glover's trial, there was much excitement. Public sentiment demanded a victim. His guilt was by many taken for granted. The true character of the only witness against him was not fully known. Mrs. Wilson was not accepted as a credible witness on the application for a new trial, and Bullard did not appear to give a full account of the robbery until September, 1874. The present attorney-general of the State, who had occasion, as counsel, to make himself familiar with this case when the petition for a new trial was pending, certifies that he became thoroughly convinced that Glover had been wrongfully convicted, and this before the arrest and conviction of Bullard, which shed additional light upon the question.

"The committee are not prepared to express the opinion that Glover is innocent; but there is so much evidence, and much of it new, to show that he was not 'accessory before the fact,' and so little evidence that he was 'accessory after the fact,' that they unite unanimously in recommending his pardon, with the usual conditions.

"For the committee,

H. G. KNIGHT, Chairman."

It is unusual to find in the newspapers reports from the Committee on Pardons of the Executive Council. There seems to be a desire in some quarters that the facts of this remarkable case should be made public; and, as we sympathize strongly in this desire, we have taken some pains to collect information, and will proceed to state a few circumstances, in our judgment very far from

unimportant, which do not appear in the foregoing report. The witness, Pratt, was confined for some eleven months in New York, but had never been arraigned for, much less convicted of, crime. His "scheme" for obtaining his enlargement was simple. He wrote to his counsel that he knew the whereabouts of a certain A., who had been concerned in the robbery in question. His counsel communicated this to the bank, and the latter to the proper authorities, by whom a messenger was at once despatched to see Pratt, and take down his statement. This, when received, was found not sufficient to convict A., the only man Pratt had in view, but to implicate Glover, whom he did not intend to touch, so strongly, that Glover was arrested, and brought here for trial. He was defended by the ablest counsel, and the jury disagreed. Pratt, at this trial, said, that, a short time before the robbery, when he was a clerk in the employ of one William R. Gray, of New York, a dealer in stolen bonds, Glover came into the office, and Gray, saying that business was dull, asked him if he could not get him some "stuff." Glover said that he knew of a "job" that was coming off, and he should soon have what Gray wanted. A few days before the consummation of the crime, Glover came with Pratt to Boston, registered his name in what was afterwards considered to be a disguised hand as from Hong Kong, and spent Thanksgiving Day here, during which day—a cold one—they walked down the Common, and down Boylston Street on the side opposite that on which stood the bank. When they reached that, Glover pointed to it, and said, "There is a bank which will soon catch hell." The next day they returned to New York, and, four days after, Pratt saw Glover forge the signatures of some of the owners of registered United States bonds, and acknowledge them before one Martine, who in turn subscribed another name (a fictitious one) as that of an attesting notary-public.

At the first trial this testimony was not sufficient, but, at the second, Pratt gave the same evidence; and this time the government had procured one of the very bonds on which the owner's name had been forged, which had been attested by this Martine in the name of a non-existent notary, and which was shown to have been stolen from the Boylston Bank. When the prosecuting officer stated in his opening that such evidence would be given, the prisoner's counsel asked for and obtained, on the ground of surprise, a postponement of the trial for a fortnight. But, at the end of that time, the defence had no explanation that satisfied the jury. Glover himself testified in his own behalf, and was convicted. A motion was made in the Superior Criminal Court for a new trial, in which this "Rev." missionary was fully heard. She, and a criminal person who had been pardoned from prison upon her representation that he was dying,—and who was sufficiently intimate at her house to call there frequently and introduce Pratt as a visitor there,—were present, and examined; and the court refused to grant a new trial. The question before it was not whether the convict should *absolutely be set free*, but whether there was sufficient doubt of the complete regularity of his conviction to warrant giving him a second chance. And there was not that degree of doubt. Pratt, though not virtuous, nor in any way justified by the government, was decidedly intelligent, was himself the son of a clergyman, had shown no malice against Glover, had no motive to say he had sworn falsely against him, and was very

clearly no such fool as to accuse himself of violating the Ninth Commandment without motive, and to do so to the active friends of Glover, known to him to be such. Exceptions were taken to the Supreme Judicial Court, ably argued for the defence, and overruled.

Then the woman we have referred to, and the man who had escaped prison, and apparently recovered his health by her means, induced our excellent Lieutenant-Governor to go to New York and inquire into the case of the unfortunate Glover; and afterwards, it seems, the case was heard by the Committee on Pardons, sitting as a court of errors and appeals, and feeling themselves competent to decide, after hearing the criminal only, or chiefly those nice points of law which are not understood by the Supreme and Superior Courts.

The cobweb which seems to have enmeshed the wits of the Honorable Council was, that the principal facts which showed Glover's complicity in the robbery, — those which were so completely corroborated by the production of the bond and the proof of his handwriting thereon, — those facts were posterior in point of time to the robbery; but they none the less proved, in connection with the others, that he was accessory before the fact to the satisfaction of the court and jury. And no one who has observed the solicitude with which the rights of accused persons are guarded in our courts will imagine that any man erroneously convicted, and with the best legal counsel to point out every error, will appeal in vain to any such tribunal. The difficulty is on the other side. We have gradually made it excessively difficult to convict a criminal. It has been well said, that it is almost impossible to convict a murderer according to law. And, when the man is convicted, any men who happen to be members of the executive council, and to be particularly soft-hearted, may think it their duty, five years afterwards, to revise and correct proceedings which they not only cannot then understand so well as the proper tribunals did at the time, but which, very probably, they could not rightly have understood if they had taken place in their presence.

Such exercise of the pardoning power, which has grown far too frequent, if not habitual, in our Commonwealth, calls loudly for public observation.

The credit accorded to Bullard, now in the State prison on account of his share in the crime, and who, it seems, has said that he did not believe that Glover had any thing to do with it, is charmingly innocent. So is the profound confidence reposed in the judgment of the prison officers and the detectives. It is singular that the opinions of such persons should, in the minds of the counsel, be weighed against the verdict of a jury and the decision of a judge.

But leaving out of view the question whether importance should be attached to the testimony of a convicted thief, given to officers and others in his prison, and without cross-examination, — whether one-half of the inmates of the State prison should be released on the evidence or opinions of the other half, — we will add, that it was clearly proved, that, during all the time before the robbery covered by Pratt's account, Bullard was actively and continuously engaged in boring through the bank-safe, and could not know what was going on in New York. But the very great looseness of the thinking faculties in the writer of the report is shown, where he says that the Attorney-General



certifies that he became convinced that Glover had been wrongfully convicted. He has never certified any such thing; and no one has been absurd enough to ask him, as attorney-general, to give a certificate in a case in which he had been counsel for the defendant before his public appointment, and with which he afterwards had no connection. This he himself tells us, adding, that, if he ever said any thing to warrant the statement, it was that he believed Glover knew he was buying the stolen bonds, but did not believe he had previous knowledge of the robbery. He was not present at any trial, and knew nothing of the facts developed.

Is this a *certificate* of innocence, and one which should outweigh the verdict of a jury and the judgments of courts? Perhaps, some day, the judge of the Court of Appeals will remember the advice which Lord Mansfield gave to Sir William Jones, then going out to India as a judge: Give your judgments, but never the reasons for them. Your judgments will doubtless be right, but your reasons will be very apt to be wrong. But Sir William was going to be a judge, and to hear arguments from both sides before he gave his judgments. The trouble with the Council is, that they hear a great deal more of one side than of the other, and perhaps a good deal out of court, especially when inquiries are made by one of them in New York; and that, moreover, it is pleasant to be merciful. So the quality of mercy is strained in too many instances, and the softness which we admire in the heart becomes less admirable when it affects the head. If reasons are as plenty as blackberries, it is better not to give them, if they convince only the reasoner.

If the new evidence suggested had any value, the statement of that would have been worth all the rest. It is only new evidence which the executive should consider. And it would be well to remember also that society has its claims, as well as the criminal.

**ALTERATION OF NOTE.** — *Citizens' National Bank v. Richmond.* — This case arose out of somewhat curious circumstances. The defendant indorsed the note of L. W. Pond for \$500. Pond in some way, by the aid of chemicals, contrived to render the figures and words showing the amount of the note invisible, and raised the amount of the note to \$2,000. The note was then presented by him to the plaintiffs for discount, and the plaintiffs discounted it in the ordinary course of their business, and in good faith. Pond was subsequently arrested, and held to answer to the charge of a large number of fraudulent transactions. Some doubt having arisen as to the note in question, the bank, in the presence of the defendant and without objection on his part, applied a solution of nutgalls to the writing, which disclosed the change that had been made in it. At maturity, payment was demanded, and two notices were sent to the defendant, as indorser, — one as upon a note for \$500, and one as upon a note for \$2,000. The lower court ruled that the plaintiffs could not recover; and they alleged exceptions. The Supreme Court has now overruled the exceptions, on the ground that "the defendant never made the note for \$2,000, which was the only one that the plaintiffs accepted."

## MINNESOTA.

THE difficulties that Mrs. Lockwood met in her application for admission to the bar of the Supreme Court of the United States, exist, it seems, in this State too. Mrs. Darsett applied to Judge Young for admission. She passed a "brilliant examination," and possessed the requisite qualifications of character, learning, and ability. The Judge, however, construed the statute, that "any male person of the age of twenty-one years," with certain qualifications, is entitled to admission, to prohibit by implication the admission of women; and refused Mrs. Darsett's application. In denying the petition, the Judge took occasion to say:—

"The law is noted for its conservatism, and especially so is that class of lawyers and judges who have made their profession a life study, and believe that a lawyer can only attain to a standing worthy of his calling by a life-long application thereto. The part assigned to women by nature, is, as a rule, inconsistent with this idea. The work which the wives and mothers of our land are called upon to perform, and the part they are to take in training and educating the young, and which none other can do so well, forbids that they shall bestow that time early and late in labor, so essential in attaining to the eminence to which the true lawyer should ever aspire. It cannot, therefore, be said that the opposition of courts to the admission of females to practise, when such opposition has been manifest, is to any extent the outgrowth of that conservatism, or, as it is sometimes styled, 'old fogysm,' which is opposed to the enfranchisement of women: it arises rather from a comprehension of the magnitude of the responsibilities connected with the successful practice of law, and a desire to grade up the profession, and encourage only those to adopt the same, as, from their attainments, natural and acquired, are qualified for, and, from their adaptability and earnestness, it may reasonably be expected will honor, the calling. Sex is by no means the only criterion by which to determine this question, as is evidenced by the many male persons applying for admission, whose characters, learning, and ability entitle them to take but a low seat in the practice. Such is the proportion of this class of applicants received, that the 'lower seats' are all full; and, for the honor of the profession, it is desirable that every means shall be adopted which will tend to raise the standard of legal ability, not forgetting the moral worth."

In Wisconsin, a similar application has been made in behalf of Miss Goodell, whose present position is thus given in the *Chicago Legal News*:—

"Chief Justice Ryan, of the Supreme Court of Wisconsin, in a solemn adjudication from the bench of that august tribunal, said that a woman could not practise law in that State; and still she does! Miss Goodell was admitted by Judge Conger, of Janesville, to practise in his court. She afterwards applied to the Supreme Court, and had the law laid down as stated above. Notwithstanding the opinion of the Supreme Court that a woman cannot practise, Judge Conger has not revoked Miss Goodell's license, but allows her to practise in his court, in contempt of the decision of Chief Justice Ryan; and we are informed she is doing a good business."

## MISSOURI.

QUASI CORPORATIONS. — LIABILITY OF COUNTIES. — *Harrison et al. v. The County of St. Louis.* — The defendants contracted with one Luken to lay water-pipes along certain streets to the grounds of the county insane asylum, there to connect with the cistern of the asylum. The work was to be done to

the satisfaction of the county engineer, and was to be superintended by him. Provision was also made in the contract that such precautions should be taken in the execution of the work as the engineer should direct. In the prosecution of the work, a ditch was dug on the grounds of the asylum, then owned by the county. The minor son of the plaintiff, in the employ of the contractor, was engaged in laying the pipe along the bottom of this ditch, when the sides caved in, owing to insufficient shoring, and he was suffocated. The defendants demurred to the plaintiff's petition, setting out the above facts, on the ground that the county is a political subdivision of the state, and not a body corporate, either private or municipal, liable for the misconduct of its servants or employés. The Supreme Court overruled the demurrer. The court says (per SHERWOOD, J.):—

"In the view we have taken of this case, it would be foreign alike to our purpose and the facts admitted by the demurrer to question the correctness of the proposition so generally concurred in elsewhere, asserted in *Reardon v. St. Louis County*, 38 Mo. 555, 'that *quasi* corporations, created by the legislature for the purposes of public policy, are not responsible for the neglect of duties enjoined on them, unless the action is given by the statute.' But as Mr. Justice Metcalf, in *Bigelow v. Randolph*, 14 Gray, 541, when speaking of the rule established in *Mower v. Leicester*, 9 Mass. 247, that a private action cannot be maintained against a *quasi* corporation for neglect of corporate duty, unless the action be given by the statute, very appropriately remarks: '*This rule of law, however, is of limited application. It is applied in the case of towns only, to the neglect or omission of a town to perform those duties which are imposed on all the towns without their corporate assent, and not to the neglect of those obligations which a town incurs when a special duty is imposed on it with its consent, express or implied, or a special authority is conferred on it at its request. In the latter case, a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be, if the same duties were imposed, or the same authority conferred on them, including their liability for the wrongful neglect as well as the wrongful acts of their officers and agents.*'

"In the case at bar, the county of St. Louis was not engaged in the discharge of duties imposed alike by general law on all counties, — duties whose performance, if neglected, might have been enforced by appropriate procedure for that purpose; but in the discharge of a self-imposed duty not enjoined by any law. And the test of the matter is this: That the county could not have been compelled to enter on the work for whose performance it contracted.

"If the doctrine asserted in *Bigelow v. Randolph*, *supra*, be the correct one, — and it has received the approval of Mr. Justice Dillon in his work on Corporations, vol. ii. sect. 762, — and if, as before stated, the county undertook the contract of its own volition, and not in the observance of a public duty imposed by general law, — then there is no refuge from this result: that the county, in regard to the performance of that contract, must occupy the same attitude as if a mere private corporation, and the work thus contracted for should be deemed a private enterprise, undertaken for its own local benefit; and this is more especially the case, as the work at the time of the occurrence, which resulted in this action, was being done on its own property. And it certainly can make no difference, in point of principle, whether the 'special duty is imposed with its consent, express or implied,' or whether, as in the present case, it voluntarily assumed the performance of that which, if imposed by the legislature, and assented to by the county, would have become a special duty. For it is the element of consent which attaches civil liability, with its attendant consequences, to the act done; in other words, as certain results flow from the acceptance by the

*quasi* corporation of that violation which fixes its liability. Consequently, it must become quite immaterial whether the thing done, from which civil liability ensues, originates in the free act of the county in the first place, or whether it is legislative permission, and its subsequent acceptance by the county, which gives origin to the act whose negligent performance produces the injury complained of. . . .

"This case is one of first impression in this State, and perhaps elsewhere; and if it goes beyond adjudicated cases, it certainly does not go beyond the principles which those cases enunciate."

**SUICIDE.** — A novel claim, says the *Central Law Journal*, has been filed in the Probate Court by the proprietor of a hotel in St. Louis. It is against the estate of a person who committed suicide in the claimant's hotel, and by which he was greatly damaged in his business, from the boarders leaving his house on account of the tragedy. It is contended that a man committing murder upon another is liable for damages, and consequently a man murdering himself is equally responsible for any injury that may result from his rash and illegal act.

H. M. VORIES, judge of the Supreme Court, died Oct. 30, in his sixty-sixth year.

## NEW YORK.

**JURISDICTION OVER LANDS CEDED TO THE UNITED STATES.** — *The Army and Navy Journal* contains an interesting discussion, from the military point of view, of the recent occurrence at West Point. The *Journal* says:—

"A few weeks ago we alluded to the case of a second-class private of engineers, who, while on duty as a sentinel at West Point, mortally wounded a hack-driver. As the case involves some points of interest to the army, we propose to discuss it. In the first place, it is to be observed that the shooting by the sentinel occurred on lands belonging to the United States, to which the New York legislature had specially ceded jurisdiction. Nevertheless, a justice of the peace issued a warrant for the arrest of the sentinel, for violation of the laws of New York; but permission to execute this process was refused by the then superintendent, who, however, permitted a county coroner to come on the reservation and empanel a jury, which found that the citizen came to his death at the hands of the soldier. Meanwhile, United States Commissioner Osborne had been communicated with, and a warrant duly issued placed in the hands of a deputy United States marshal and duly acknowledged by the commanding officer, and the sentinel turned over to the United States civil authorities of criminal jurisdiction. In due time the case came on for hearing in the commissioner's court in New York City, the United States being represented by General B. F. Foster, Assistant District-Attorney, and the prisoner, under special permission from the Secretary of War, by Professor Gardiner, professor of law at the Military Academy. From the evidence adduced,—all possible witnesses having been examined,—it appeared, that shortly after midnight, while the sentinel was walking post between the academic building and South gate, he heard a carriage rapidly proceeding by the lower road, in front of Cadet Hospital, towards that gate. Stepping to the junction of the roads near a gaslight, he challenged the driver—a stranger—three times, ordering him to halt, which summons was not immediately obeyed. The sentinel then ran in front of the team to stop it, but had to spring to one side to avoid being

run over. As the carriage passed, his piece was fired in close proximity. The ball was cut in two by passing through the carriage lamp. It there pierced the cushion of the driver's seat from beneath, and penetrated the driver's leg between the knee and thigh, carrying into the wound portions of the cushion. The wound was not necessarily mortal, but in a few days *tetanus* ensued, resulting in death. It further appeared by the evidence, that the sentinel was required to load his piece at ten o'clock with ball cartridge, not only to give an alarm in case of fire, but to use, if necessary. He was required to stop and examine all suspicious characters and vehicles; to take them to the guard-house at the entrance-gate, if necessary, for examination; and to prevent fast driving. These orders were undoubtedly legal, as they were concluded to be, and were given in the exercise of a discretion imposed upon all commanding officers intrusted with the care of large quantities of government property, on military sites exclusively under the jurisdiction of the national government.

"As certain citizens are permitted to reside at West Point, and a hotel is located there, with sanction of the proper authorities, the question of extent of military authority in matters of police as to citizens also became an element to be considered. It was long ago held by a United States attorney-general, that, although there is a United States post-office located at the Point, it did not authorize a citizen to insist on a right of way to such office, when the post commander, in the exercise of his military discretion, chose to exclude them. In the same manner, it may be said, that whoever comes upon a military post, whether for business or pleasure, comes there subject to such military police regulations as the commanding officer, in his judgment, may deem necessary.

"In defence, the sentinel set up an accidental shooting; but it was also argued, that, even had it been deliberate, a certain amount of discretion, such as an ordinary man would use, was vested in the soldier, in determining how he was to obey his lawful orders, and compel the hackman to submit to inspection. It was conceded that there had been no malice on the part of the soldier, as the evidence showed he was a stranger to the deceased. If he had acted unlawfully and wilfully, then, under the Revised Statutes of the United States, the shooting would have been 'manslaughter.' He was, however, as was argued by counsel, acting lawfully when he challenged and endeavored to halt the driver. Assuming the shooting to have been intentional or wilful, — which the direction of the shot, when the sentinel was so close to the deceased, made highly improbable, — nevertheless, the sentinel acted under lawful orders, and not in excess of the discretion reposed in him, and was, therefore, not amenable under the statute.

"After a careful hearing, Commissioner Osborne laid the case and all the evidence before the United States grand jury for the Southern District of New York, who refused to find a 'true bill;' and, on motion of prisoner's counsel, he was duly discharged, and returned to duty. Since then, we understand that the local State grand jury and district-attorney for Orange County have, within the week, undertaken to investigate this case under the laws of New York, and that this grand jury found a 'true bill.' In doing this, officers at West Point, though not all who were material, were summoned to Newburgh as witnesses, at their own expense, and temporarily withdrawn from their public duties. If the subpoenas served upon them had shown on their face that the case was the identical one we have referred to, we believe they would have been justified in refusing to recognize the validity of the process. While respect to the civil authority is always to be enjoined upon the military man, yet it is also to be borne in mind that unconstitutional process, or such as has been issued without jurisdiction, — as was the case of that from this last coroner's jury, — is absolutely void. We have no more noticeable instance than in the laws

of some States, which, when a *habeas corpus* is issued from the State court, authorize the sheriff to take into his custody the individual whose liberty is sought. Yet the United States Supreme Court has declared that an army officer, served with such a writ to produce a soldier on ground of illegal enlistment, should neither surrender his custody nor produce him, but only make respectful return of the grounds for holding him.

"We are at a loss to conceive how the local State authorities can assume to interfere in this matter, after the numerous decisions upon the point. Cession of jurisdiction must be for some purpose; and, if not for this, it is difficult to determine what the object could be. For offences not committed on the ceded tract, the State authorities would undoubtedly have jurisdiction; but in this case Congress had, by law, provided for the identical offence, and as to the court where triable. Exclusive legislation signifies exclusive jurisdiction. As well might the State authorities claim jurisdiction over an offence committed in the ceded tract, commonly called the District of Columbia. We presume a warrant will be issued by the State authorities, and a demand made on the soldier's present commanding officer for his surrender.

"Over half a century ago, Attorney-General Wirt delivered an interesting opinion on the duty of a commanding officer, under the present fifty-ninth article of war. Said he: 'The commanding officer owes a duty to the men under his command, — he owes them the duty of protection, so long as they continue in the faithful discharge of their duty. This duty is first in point of time, and highest in point of obligation. This thirty-third article (now fifty-ninth) gives him no authority to withdraw that protection and deliver over his men to others, except in the case which it describes, where they are accused of such an offence as is punishable by the known laws of the land. To justify him in delivering them up, he must see that the case described by the article has arisen. He is required by his duty to exercise his judgment upon the case. It is not enough to tell him that some offence has been committed: he must know what the specific offence is, in order that he may see whether it is an offence "punishable by the known laws of the land."'

"In the case under consideration, the State authority, having no jurisdiction, can make no lawful demand which will withdraw the soldier from his duty and service to the general government. Any legal process void for want of jurisdiction is absolutely null, and whoever acts under it does so at his peril. The laws of the land in this case are those of the United States, and not of the State. Should the soldier chance to be arrested under it, his counsel propose to apply to the United States District Court for a writ of *habeas corpus*, and thus take him by summary proceedings from the custody of the State sheriff."

REVENUE TAX. — *United States v. Halloran*. — UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK. — An action to recover an unpaid tax on spirits. The producing capacity of the defendant's distillery was duly fixed by a survey made in accordance with the provisions of the tenth section of the "Act imposing taxes on distilled spirits," approved July 20, 1868 (15 Stat. 129), at 1,531 gallons of spirits *per diem*, eighty per cent thereof being 1,224 gallons. During the month of March, 1869, the defendant, in fact, produced less than eighty per cent of the producing capacity of his still; was assessed for the actual amount produced, and paid the assessment. The government sued to recover the difference between the tax paid and the amount of the tax upon eighty per cent of the capacity of the still. The court (SHIPMAN, J.), after referring to the above facts, says: —

"First, The twentieth section of the act of July 20, 1868, made the producing capacity, under the above-recited facts, and not the amount produced, the measure of taxation.

"The distiller was, at all events, made taxable for a production of spirits not less than eighty per cent of the producing capacity of his distillery, as determined by the survey; whether that quantity was actually produced by him or not, or whether he used a bushel of grain or not, eighty per cent of the estimated (not actual) capacity of the distillery was the smallest amount for which he was made taxable. If he actually produced more, or if the quantity of grain or other materials used for distillation, as ascertained by the assessor, showed a larger production, he was made taxable to the full extent of that production thus shown. *Collector v. Beggs*, 17 Wall. 182; *Palman v. Collector*, 20 id. 189.

"Second, An assessment by an officer is not a condition precedent to the collection of taxes, where the statute prescribes the amount to be paid; and this amount can be recovered in an action of debt.

"An assessment is only determining the value of the thing taxed, and the amount of the tax required of each individual. It may be made by designated officers, or by the law itself. *Dollar Savings Bank v. United States*, 19 Wall. 227; 9 Alb. Law Jour. 302. The twentieth section of the statute imposing a tax upon distillers (15 Stat. at Large, 133), indeed, requires that the assessor shall determine whether the distiller has accounted in his return for the product of the materials which he used; and a rule is prescribed by which such ascertainment shall be made. No question is raised in this case that the true amount of spirits which was actually made, or which should have been made, was not returned and correctly ascertained by the assessor. It is admitted that the spirits actually made did not equal eighty per cent of the producing capacity. Under these facts, the law itself, and not the assessor, determined that the measure of the taxation to be imposed upon the distiller was eighty per cent of the producing capacity. He had become liable to pay upon the eighty per cent, and might have been liable to pay more, in case he had produced beyond the minimum rate, or if the quantity of grain used for distillation, as ascertained by the assessor, shows a larger production.

"Third, In an action upon the distiller's bond, an erroneous assessment, which did not include the amount actually due, as prescribed by the statute, is not conclusive against the government. It is claimed by the defendant, that the assessor had assessed upon the distiller's return, and had found that \$1,496 only, was due for barrel tax and *per diem* tax, which amount was collected by distraint, and that the assessment so made and paid is final and conclusive, and the government can have no action for the recovery of any tax for the month of March, even though the tax which was collected was for a less sum than might have been assessed under the law.

"The principles which have been declared in *Dollar Savings Bank v. United States*, 19 Wall. 227, and in *Clinckenbeard v. United States*, 21 id. 65, seem to be decisive upon this point. In the former case, it was held that an action of debt would lie to recover an amount due for taxes which had not been assessed. The latter case decided that, in an action against a distiller upon his bond to recover the amount of an assessed tax, the assessment, though not appealed from, was not *res adjudicata* and was not conclusive, and that the defendant was not precluded from showing its erroneous character.

"The government is not suing upon the assessment of the officer, but has resorted to an action of debt to recover a tax which has never been assessed in accordance with the statute. The assessment which was made is not such a judgment or decree as to bind the government in this collateral proceeding."

## PENNSYLVANIA.

**HON. WALTER H. LOWRIE.** — "On Thursday last, Judge Lowrie died at his residence in Meadville, where, since December, 1870, he has been discharging his duties as President Judge of Crawford County. Judge Lowrie was born on March 31, 1807; he was educated at the Western University at Pittsburgh, studied law with Judge Forward of that city, and was admitted to the bar at an early age.

"In the fall of 1851, when the first election for justices of the Supreme Court was held under the constitutional amendment of 1850, he was elected as one of the members of the bench, and drew the term of twelve years. He took his seat as a justice of the Supreme Court, in December, 1851, and in December, 1857, he was commissioned chief justice for six years, in place of Chief Justice Lewis, whose term of office then expired.

"After his retirement from the Supreme Bench (in December, 1863), he resided in this city (Philadelphia), until he moved to Meadville.

"By the act of Feb. 24, 1870, Crawford County was created into a separate judicial district, known as the 30th District, and the people of that district, in the fall of that year, elected him their president judge. He took his seat on the bench there in December following, and has for the last six years been faithfully performing his duties as judge of that district. His decisions while upon the Supreme Bench are found commencing in *Harris's Reports*, and concluding in *Wright's*. While a few of them may not have been followed by his successors, still, most of them show his learning and purity of character, and mark him as a jurist of more than ordinary ability." — *Legal Intelligencer*.

## RHODE ISLAND.

**INCOME TAX.** — The first authoritative answer to the much-discussed question, whether the United States can maintain an action against a citizen who has neglected to make his return, but has paid the tax assessed by the United States assessor, with the added penalty for his neglect, to recover any deficit in the tax, in case the amount so assessed is less than the true amount, has been given in the case of *United States v. Hazard*, lately decided in the Circuit Court. The facts appear in the opinion of the court (*CLIFFORD and KNOWLES, JJ.*), which was delivered by the district judge, as follows : —

"Questions more novel, interesting, and important, than those arising under the demurrers in this case, are in this district but rarely presented for consideration. Of this the learned counsel of the parties seemed to have been mindful, and, accordingly, in their arguments (by agreement submitted in writing), have discussed those questions with commendable fulness, painstaking, and vigor.

"The action is one of debt, to recover the sum of \$17,451.05, for a tax on defendant's income, alleged to be due to the United States for the year 1868, by virtue of sect. 13 of the act of Congress approved March 2, 1867 (14 Stat. at L. 477). The suit was entered at the June Term, 1875, of this court, and, by order of the Treasury Department, was continued, though not answered, until the November Term following, when, by leave, the defendant made reply, filing with the general issue three special pleas, each of them in substance setting up as a bar to recovery the pay-



ment by the defendant of the assessment upon him for income for the year 1868, made by the assistant-assessor of the district, together with the fifty per cent penalty imposed on account of his failure to make return of his income for that year. To these three special pleas the plaintiff demurs *seriatim*; but, in their briefs and arguments, the learned counsel of the parties treat the three as in fact substantially one only.

"In support of the demurrer, the plaintiff avers that the principles of construction and decision established and promulgated by the Supreme Court of the United States in *Dollar Savings Bank v. United States*, 19 Wall. 227, clearly recognize and affirm the right of action in this case as against the bar set up in said special pleas; and to substantiate this averment, and repel all assaults upon it, was throughout the endeavor of his learned counsel; and, on the other hand, to weaken and overthrow this position of the plaintiff, was the endeavor of the learned counsel of the defendant throughout his elaborate and ingenious argument. Indeed, it may be said that the only point of contestation presented was the correctness or soundness of this proposition of the plaintiff. As the court should rule upon this point for the plaintiff or the defendant, it was in fact conceded, must it sustain or overrule the plaintiff's demurrers?

"To the question thus presented, the court has given consideration, with a result which renders it unnecessary to recapitulate, canvass, or criticise the arguments of the learned counsel of either party. Its conclusion is, that the case above cited is, as claimed by the plaintiff, a case directly in point, to be construed and respected as a precedent decisive of the point presented, controlling the action of this court, and compelling a sustaining of the plaintiff's demurrers. And this, too, even were the principles embodied in that precedent as unaccordant with the views of the presiding judge as with those of his associate of this term. The comments and suggestions of the learned counsel of the defendant, in regard to the decision and opinion of 19th Wallace, it cannot be denied, were forcible and persuasive, as well as ingenious; but, until they shall have been adopted and promulgated by the Supreme Court, that opinion, in the judgment of this court, must be construed as already stated, — that is, as necessitating the sustaining of the demurrers in this case.

"Demurrer sustained."

That this decision will be very far-reaching, need not be said. Owing to the difficulty, in many cases, of an exact compliance with the law relating to returns, some uncertainty in the meaning of the law itself, and more or less capriciousness in the rules from time to time laid down by the department for the government of the assessors, and, perhaps, for other reasons not so sound, it became not unusual, during the existence of the law, for those liable to the tax to allow themselves to be "doomed," in the supposition that that was an end of the matter.

There is another aspect of the decision, and a serious one. By sect. 3186 of the United States Revised Statutes, re-enacting the revenue law previously in force, it is provided that —

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States, from the time it was due, until paid, with interest, penalties, and costs that may accrue in addition thereto, upon all property, and rights to property, belonging to such person."

If the department purposes — as it is said it does — reviewing the whole matter of the income tax, Congress ought to interfere by legislation, to the extent,

at least, of relieving those who have in good faith taken titles from delinquent tax-payers, from the secret liens created by the statute above quoted.

The principle governing in the above case has also been applied in *United States v. Halloran*, lately decided in New York, an account of which we give elsewhere.

## TENNESSEE.

**LIABILITY OF SLEEPING-CAR COMPANIES.** — A novel question arose in *Blum v. Southern Pullman Palace Car Co.* (U. S. Circuit Court, Western District of Tennessee). It appeared that the plaintiff, while travelling upon a sleeping-car owned and controlled by the defendants, went to bed in the berth assigned him, placing his wallet under the pillow. On rising in the morning he found that the wallet, which contained a large sum of money, was missing. The plaintiff declared against the defendants both as common carriers and as innkeepers; but, at the trial, abandoned his first contention, and insisted that the defendants should be held to the liability of the last-named class of persons. Judge BROWN, however, ruled otherwise, saying, in his charge to the jury, —

"The liability of the innkeeper, indeed, stands less upon reason than upon custom growing out of a state of society no longer existing.

"There are good reasons for not extending such liability to the proprietor of a sleeping-car.

"1. The peculiar construction of sleeping-cars is such as to render it almost impossible for the company, even with the most careful watch, to protect the occupants of berths from being plundered by the occupants of adjoining sections. All the berths open upon a common aisle, and are secured only by a curtain, behind which a hand may be slipped from an adjoining or lower berth, with scarcely a possibility of detection.

"2. As a compensation for his extraordinary liability, the innkeeper has a lien upon the goods of his guests for the price of their entertainment. I know of no instance where the proprietor of a sleeping-car has ever asserted such lien, and it is presumed that none such exists. The fact that he is paid in advance does not weaken the argument, as innkeepers are also entitled to prepayment.

"3. The innkeeper is obliged to receive every guest who applies for entertainment. The sleeping-car receives only first-class passengers travelling upon that particular road, and it has not yet been decided that it is bound to receive those.

"4. The innkeeper is bound to furnish food as well as lodging, and to receive and care for the goods of his guests, and, unless otherwise provided by statute, his liability is unrestricted in amount. The sleeping-car furnishes a bed only, and that, too, usually for a single night. It furnishes no food, and receives no luggage, in the ordinary sense of the term. The conveniences of the toilet are simply an incident to the lodging.

"5. The conveniences of a public inn are an imperative necessity to the traveller, who must otherwise depend upon private hospitality for his accommodation, — notoriously an uncertain reliance. The traveller by rail, however, is under no obligation to take a sleeping-car. The railway offers him an ordinary coach, and cares for his goods in a van especially provided for that purpose.

"6. The innkeeper may exclude from his house every one but his own servants and guests. The sleeping-car is obliged to admit the employés of the train to collect fares and control its movements.

"7. The sleeping-car cannot even protect its guests, for the conductor of the train has a right to put them off for non-payment of fare, or violation of its rules and regulations.

"I hold, therefore, that sleeping-car companies are not subject to the responsibility of innkeepers at common law, and that defendant cannot be held liable upon that ground."

As to the true character of the defendants' obligation towards the plaintiff, and the measure of damage for the breach of it, the Judge continues:—

"The scope of the liability of companies of this kind, so far as I know, has never been judicially determined. It is, undoubtedly, the law, that where a passenger does not deliver his property to a carrier, but retains the exclusive possession and control of it himself, the carrier is not liable in case of a loss; as, for instance, when a passenger's pocket is picked, or an overcoat or satchel is taken from a seat occupied by him. Upon this theory, it is insisted by the defendant that it cannot be held liable for negligence, inasmuch as the clothing and effects of its guests are never formally delivered to it. I cannot for a moment accede to this proposition. It is scarcely necessary to say that a person asleep cannot retain manual possession or control of any thing. The invitation to make use of the beds carries with it an invitation to sleep, and an implied agreement to take reasonable care of the guest's effects while he is in such a state that care, upon his own part, is impossible. There is all the delivery which the circumstances of the case will admit.

"I think it should keep a watch during night, see to it that no unauthorized persons intrude themselves into the car, and take reasonable care to prevent thefts by the occupants. . . .

"The measure of damages only remains to be considered. The plaintiff again claims benefit of the law applicable to innkeepers, and insists upon his right to recover for the entire amount of his loss. The same reasoning would entitle him to recover a fortune, if he had seen fit to carry it about his person and lay it under his pillow; and this, too, in the absence of notice to the company. The defendant, however, like a common carrier of passengers, is liable only for such property as the passenger may reasonably be supposed to carry about his person. It extends to his clothing and personal ornaments, the small articles of luggage usually carried in the hand, and a reasonable sum of money for his travelling expenses. A man may lawfully carry any sum he chooses about his person; but, with the modern facilities for obtaining drafts and sending money by express, it is, to say the least, imprudent to carry a large amount. As defendant received but two dollars for the use of its berth, it would be grossly unjust to mulct it in any sum the plaintiff may choose to swear he has lost, when the charges, simply, of transmitting this amount by express, might have been double or quadruple the price paid for the accommodation. The rule claimed, by plaintiff would place carriers and owners of sleeping-cars completely at the mercy of unscrupulous and designing men. It was, at least, the duty of the plaintiff to notify the conductor of the amount he carried about him; though even then it is very doubtful whether he could have charged him with the responsibility.

"The substance of the law, then, is this: the defendant was not only bound to furnish the plaintiff with a berth for his accommodation, but to take watch and reasonable care that he suffered no loss. If plaintiff's loss was occasioned by the want of such care, and his own negligence did not contribute to it, he is entitled to recover such sum as you may deem reasonably necessary for his personal expenses, considering the length of his journey, and all the other circumstances of the case."

## VERMONT.

**PUBLIC SCHOOLS. — EXCUSE FOR NON-ATTENDANCE. —** *James Ferriter et al. v. J. M. Tyler et al.* — **SUPREME COURT.** — A question of interest arose in the above-named case, in which the facts were these: The complainants are members of a Roman Catholic church. On June 4, 1875, the priest of the church, in behalf of the complainants, requested the respondents, who were the committee of the school district in which the church is situated, to excuse Catholic children from attendance at the schools on "all holy days," and especially on the above-named day, being *Corpus Christi* day, and a "holy day." The committee refused to grant the request, on the ground of the interruption that would be caused to the schools. Thereupon about sixty children absented themselves from school by direction of their parents to attend religious exercises on said June 4. At their next appearance at the school, the committee refused to admit them, without an assurance that for the future the rules of the school should be obeyed. The priest and the parents refused to give such assurance, and brought their bill to enjoin the committee from preventing the admission of the children to the schools. The chief ground of the relief asked, was, in the language of the bill, "Their (the orators') constitutional right to worship God according to the dictates of their own consciences, without being abridged in the enjoyment of their civil rights." Art. iii. of the State constitution.<sup>1</sup>

The court *held* that the bill should have been filed in the name of the children, as the real parties plaintiff; but, considering the character of the application, the court preferred not to stand on that technical ground, but proceeded to examine the matter on its merits. The opinion begins with some account of the history of the clause in question, in the course of which it appears that the original constitution of 1777, besides the third article before quoted, contained also two clauses (brought into one by the revision of 1786), substantially like the provision now in force (sect. 41 of the present constitution), for the establishment of schools "for the convenient instruction of youth," and directing that "laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution; and all religious societies and bodies of men that have or may hereafter be united and incorporated for the advancement of religion and learning . . . shall be encouraged and protected in the enjoyment of

<sup>1</sup> The third article of the Constitution is as follows: "That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no man ought to, or of right can, be compelled to attend any religious worship, &c., contrary to the dictates of his conscience; nor can any man be justly deprived or abridged of any civil right as a citizen on account of his religious sentiments or peculiar mode of religious worship; and no authority can or ought to be vested in or assumed by any power whatever, that shall in any case interfere with, or in any manner control, the rights of conscience in the free exercise of religious worship; nevertheless, every sect or denomination of Christians ought to observe the Sabbath, or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God."

the privileges, immunities, and estates which they in justice ought to enjoy, under such regulations as the General Assembly of this State shall direct." The opinion (per BARRETT, J.) then proceeds:—

"When our Constitution was first framed and adopted, no occasion had been given for regarding the grievance that is now complained of; so, such grievance could not have been in mind as an object specially to be provided against in the making of that art. iii. On the other hand, the government-making people of New England, in the causes that had led to its first settlement by the Pilgrims, and by their children, and by after emigrants and *their* children, had ever deep and fresh-in-mind occasion and reason for the provisions of that article. And nothing could more fully, pointedly, and specifically indicate the nature of such occasion and reason than the language of the article itself. It was designed by it to secure to every subject equal civil rights, irrespective of his religious faith; so that his being a Catholic or a Protestant; his being a Calvinist or an Arminian; his being an Orthodox evangelical or a free-thinker; his being a Baptist or a Universalist; an Episcopalian or a Quaker,—should not make him the object of discriminating legislation or judicial judgment to his disadvantage, as compared with those of different faith and practice; so that no law should be aimed or executed against him because he professed and practised one form of religious belief, or disbelief, rather than another, within the limits of personal immunity consistent with good order and the peace of society under the government. It was designed to debar the law-making and law-administering powers from enacting, or adjudging, that, unless the subject should profess a prescribed system of faith, and become a member of a prescribed religious organization, and conform in his worship to the prescribed ritual, he should not be entitled to the same personal rights, privileges, and enjoyments under the government as those who should do so. It was designed to secure absolute equality before the law of all subjects under the law, whatever might be their faith or notions in the matter of religion. And, as a result, may not a Catholic be a Catholic, as freely as a Protestant may be a Protestant, with no law aimed at him because he is a Catholic and not a Protestant? It would seem to be trifling with a momentous subject, to claim that art. iii. was designed to prohibit the legislature from enacting any law the carrying into effect of which might interfere with the wishes and tastes and feelings of any of the citizens in the matter of religion, and even with the performance of religious rites that should be regarded as matter of conscientious duty on the part of some of the subjects of the realm. Government, with reference to the ends designed to be secured and served by its existence and action, is altogether a practical matter,—not speculative, fanciful, sentimental, or impracticable. It performs its functions and works out its results by the instrumentality of laws enacted and laws administered,—laws adapted to the subject-matter of them, and to the accomplishing of the ends designed, and operating equally and alike upon all who come within their scope.

"One of the chief ends of the government is to provide means and facilities for developing and educating and training the young into virtuous and intelligent men and women. This is recognized and emphasized by the section of the Constitution already referred to as to schools; and which, since 1786, has been in these words: 'Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force and duly executed, and a competent number of schools ought to be maintained in each town for the convenient instruction of youth.'

"As already suggested, the Constitution proceeds upon the assumption that this can be done consistently with art. iii. In pursuance of that assumption, the legislature, through the whole course of our existence as a State, has been active and

earnest, and considerate, in the making of laws for the existence and support and management of what is meant by 'schools in each town.' In so doing it has never aimed to make, nor has it ever made, any provision that discriminates or distinguishes in its operation, between persons of different religious sects. All are subjected alike to the law and its administration. The Methodist, who regards his camp-meeting as demanding as much of his conscience as the Episcopalian does his Christmas or Lent; the Episcopalian, who regards the feast and fast days of his church as demanding as much of his conscience as the Catholic does his holy '*Corpus Christi*;' the Congregationalist and Presbyterian, and Baptist and other sects, who care for none of these things, and whose prayer-meetings and protracted meetings demand as much of their consciences as in the case of the others before named; and the man of no preference and no religion, — *all*, and all their children, are subjected alike to the school laws and to their administration.

"Art. iii. was not designed to subjugate the residue of the Constitution, and the important institutions and appliances of the government provided by the enacted laws for serving the highest interests of the public as involved in personal condition and social relations, to the peculiar faith, personal judgment, individual will or wish, of any one in respect to religion, however his conscience might demand or protest. In that respect, it is implied, that while the individual may hold the utmost of his religious faith, and all his ideas, notions, and preferences as to religious worship and practice, he holds them in reasonable subserviency to the equal rights of others, and to the paramount interests of the public as depending on, and to be served by, general laws and uniform administration. Rights of conscience and schools, under the Constitution, were, when that instrument was made, and have been, during all its continuance, to be harmonized with practicable consistency, — the schools under sect. 41 not to be subordinated to the rights of conscience under art. iii. any more than the rights of conscience under art. iii. are to be subjected to the rights as to schools under sect. 41." . . .

"It is plain that, in those early times, *religion and learning*, under the Constitution and the laws to be enacted, were deemed to be compatible, and that schools of all grades, from the 'schools in each town' to the university, were to be the subjects of legislation under the Constitution; and it is especially plain that the 'schools in each town,' as early as 1786, were combined with, if not given the precedence to, *religious societies and bodies of men, as an instrumentality of the government, by means of laws, 'for the encouragement of virtue, and prevention of vice and immorality.'* In conclusion on this topic, as we cannot improve, so we adopt the language of Judge POLAND, in *Williams v. School District in Newfane*, 83 Vt. 275: 'Without making further reference to the almost numberless acts of the legislature, exhibiting the most active watchfulness and fostering care for the cause of popular education, enough has already been stated to show that the whole subject of the maintenance and support of our common schools has ever been regarded in this State as one not only of public usefulness, but of public necessity, and one which the State in its sovereign character was bound to sustain.'

"We now proceed to remark, that it stands out so plain as not to be matter for debate, even if it be not expressly conceded, that schools, in order to realize the intent of the Constitution in their behalf, must be subjected to system and order under established rules. Hence, the law charges the committee with the duty of 'adopting all requisite measures for the inspection, examination, and regulation of the schools, and the improvement of the scholars in learning.' Gen. Stat. c. 22, sect. 89.

"Let it be granted that parents and others may, upon their own respective reasons, control the attendance of the scholars, as against the official right of the committee in that behalf, and, practically, the ground of system and order and improvement

has no existence. For the parents and guardians or the scholars may, each on his own motion, and on his own notions, withhold their respective scholars from the schools. In this respect, so far as its effect on the schools is concerned, it makes no difference whether the occasion and motive involve conscience, will, whim, or the pocket." . . .

"Let it be repeated, then, that that article in the Constitution was not designed to exempt any person or persons of any sect, on the score of conscience as to matters of religion, from the operation and obligatory force of the general laws of the State, authorized by other portions of the same instrument, and designed to serve the purposes contemplated by such other portions; it was not designed to exempt any persons from the same subjection that others are under to the laws and their administration, on the score that such subjection at times would interfere with the performance of religious rites and the observance of religious ordinances, which they would deem it their duty to perform and observe but for such subjection. While all stand on equal footing under the laws, both as to benefits and privileges proffered, and as to exactions made and liabilities and penalties imposed, no one's rights of conscience, as contemplated by said art. iii., are violated in a *legal* sense."

#### WASHINGTON TERRITORY.

JUDGE GREEN, of the Second District, Washington Territory, may fairly claim to be considered the most cautious occupant of the bench extant. A case recently came before him, in which an Indian was charged with the murder of another nomad, who was a medicine-man. The defendant's wife had been very ill, and labored under the firm conviction that the medicine-man had bewitched her. The husband went to the medicine-man and requested the release of his wife from the spell which was killing her. The demand was refused by the reputed wizard, who further said, that the woman was in his power, and would die the next day. Upon this the husband very naturally killed him. The defence took the ground that a belief in witchcraft was sanctioned by the Bible, and was common all the world over. The judge, in charging the jury, observed that he did not feel at liberty to assume that there was no such thing as witchcraft; that he would not take upon himself to deny the possibility of the enchantment of the sick woman; and that, as the defendant believed it to be his duty to save his wife by killing the medicine-man, it was proper for the jury to find a verdict of not guilty: which they accordingly did, to the confusion of all future medicine-men. — *Exchange*.

#### ENGLAND.

CRIMINAL JURISDICTION. — THE "FRANCONIA" CASE. — A question of great moment, both from its increasing practical importance and from the interesting points of law involved, arose in *Reg. v. Kuhn*. The *Franconia*, a German vessel, while in command of the defendant, came into collision with the British ship *Strathclyde*, within two miles of the English coast, sunk her, and Jessie Young, a passenger in the last-named vessel and a British subject, was drowned. The disaster was due to the gross carelessness of Kuhn; and he was brought to trial at the Central Criminal Court for manslaughter, and convicted. It was contended, however, in his behalf, that his offence, whatever it might be, was committed by a foreigner, on board a foreign ship, and on the high seas; that, therefore, the common-law courts had no jurisdiction. On the other hand,

the crown contended, that the death having occurred on board an English ship, the offence had been committed within British jurisdiction; and, secondly, and chiefly, the vessels being within the three-mile limit at the time of the disaster, the offence was committed within the realm of England, and was triable by the English courts. At the first hearing, the judges not being unanimous in their opinions, a rehearing was ordered; and, on the reargument, seven out of the thirteen judges who sat reached conclusions adverse to the crown. "The majority of the judges (COCKBURN, C. J., KELLY, C. B., BRAMWELL, J. A., Sir R. PHILLIMORE, LUSH, J., POLLOCK, B., and FIELD, J.) held, that, though a State had dominion within the distance of three miles from low-water mark, yet that such a dominion was merely for purposes of defence and security, and did not warrant the assumption of criminal jurisdiction in respect of peaceable foreign vessels passing over those waters. Of the minority, LORD COLERIDGE, C. J., and DENMAN, J., decided for the crown on both the points raised, — viz., as to the three miles being within the jurisdiction, and also as to the act having been committed on board a British vessel; whilst BRETT, J. A., and AMPHLETT, B., founded their judgments on the first point alone. GROVE, J., held that either point was sufficient to sustain a conviction; and LINDLEY, J., elected to rest his opinion on the question of jurisdiction within the three-mile zone, at the same time expressing the view that there was some judicial authority for the contention that the act was done on board a British vessel, though he did not feel satisfied on the matter." We have received a portion only of one of the opinions delivered, that, namely, of the Lord Chief Justice, which is as follows : —

"Possibly, after these precedents and all that has been written on this subject, it may not be too much to say, that, independently of treaty, the three-mile belt of sea might at this day be taken as belonging, for these purposes, to the local State. But it is scarcely logical to infer, from such treaties alone, that, because nations have agreed to treat the littoral sea as belonging to the country it adjoins, for certain specified objects, they have therefore assented to forego all other rights previously enjoyed in common, and have submitted themselves even to the extent of the right of navigation on a portion of the high seas, and the liability of their subjects therein to the criminal law, to the will of the local sovereign and the jurisdiction of the local State. Equally illogical is it, as it seems to me, from the adoption of the three-mile distance in these particular instances, to assume, independently of every thing else, a recognition, by the common assent of nations, of the principle that the subjects of one State, passing in ships within three miles of the coast of another, shall be in all respects subject to the law of the latter. It may be that the maritime nations of the world are prepared to acquiesce in their appropriation of the littoral sea; but I cannot think that these treaties help us much towards arriving at such a conclusion. At all events, the question remains, whether judicially I can infer that the nations who have been parties to them, and still further those who have not, have thereby assented to the application of the criminal law of other nations to their subjects on the waters in question, and on the strength of such inference to apply the criminal law of this country. The uncertainty in which we are left, so far as judicial knowledge is concerned, as to the extent of such assent, presents, I think, a very serious obstacle to our assuming the jurisdiction we are called upon to exercise, independently of this, to my mind, still more serious difficulty, — that we should be assuming it without legislative warrant. So much for treaties. Usage as to the application of the general law of the local State to foreigners on the littoral sea, notwithstanding



reference to usage, is frequently made by the publicists in support of their doctrine, there is actually none. No nation has arrogated to itself the right of excluding foreign vessels from the use of its external littoral waters for the purpose of navigation, or has assumed the power of making foreigners in foreign ships passing through these waters subject to its laws, otherwise than in respect of matters connected with the navigation, or with revenue, local fisheries, or neutrality. And it is to these alone that the usage relied on is confined. Nor have the tribunals of any nation held foreigners in these waters amenable generally to the local criminal law in respect of offences. It is for the first time in the annals of jurisprudence that a court is now called upon to apply the criminal law of the country to such a case as the present. It may well be, I say again, that—after all that has been said and done in this respect; after the instances which have been mentioned of the adoption of the three-mile distance, and the repeated assertions of this doctrine by the writers on public law—a nation which should now deal with this portion of the sea as its own, so as to make foreigners within it subject to its law, for the prevention and punishment of offences, would not be considered as infringing the rights of other nations. But I apprehend, that as the ability so to deal with these waters would result, not from any original or inherent right, but, *ex hypothesi*, from the acquiescence of other States, some outward manifestation of the national will, in the shape of open practice or municipal legislation, so as to amount, at least constructively, to an occupation of that which was before unappropriated, would be necessary to render the foreigner, not previously amenable to our law, subject to its general control. That such legislation, whether consistent with the general law of nations or not, would be binding on the tribunals of this country,—leaving the question of its consistency with international law to be determined between the governments of the respective nations,—can, of course, admit of no doubt. The question is, whether such legislation would not, at all events, be necessary to justify our courts in applying the law of this country to foreigners under entirely novel circumstances in which it has never been applied before. It is obviously one thing to say that the legislature of a nation may, from the common assent of other nations, have acquired the full right to legislate over a part of that which was before high sea and as such common to the world; another, and a very different thing, to say that the law of the local State becomes thereby at once, without any thing more, applicable to foreigners within such part, or that, independently of legislation, the courts of the local State can *proprio vigore* so apply it. The one position does not follow from the other; and it is essential to keep the two things—the power of Parliament to legislate and the authority of our courts without such legislation to apply the criminal law where it could not have been applied before—altogether distinct, which it is evident is not always done. It is unnecessary to the defence, and equally so to the decision of the case, to determine whether Parliament has the right to treat the three-mile zone as part of the realm, consistently with international law. That is a matter on which it is for Parliament itself to decide. It is enough for us that it has the power to do so. The question really is, whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation. I am clearly of opinion that we cannot, and that it is only in the instances in which foreigners on the seas have been made specially liable to our law by statutory enactment that that law can be applied to them.

#### THE RESULTS.

“In the result, looking to the fact that all pretension to sovereignty or jurisdiction over foreign ships in narrow seas has long since been wholly abandoned; to the uncertainty which attaches to the doctrine of the publicists as to the degree of sovereignty and jurisdiction which may be exercised on the so-called territorial sea;

to the fact that the right of absolute sovereignty therein, and of penal jurisdiction over the subjects of other States, has never been expressly asserted or conceded among independent nations, or, in practice, exercised and acquiesced in, except for violation of neutrality, or breach of revenue or fishery laws, which, as has been pointed out, stand on a different footing; as well as to the fact that neither in legislating with reference to shipping, nor in respect of the criminal law, has Parliament thought proper to assume territorial sovereignty over the three-mile zone, so as to enact that all offences committed upon it, by foreigners in foreign ships, should be within the criminal law of this country, but, on the contrary, wherever it was thought right to make the foreigner amenable to our law, has done so by express and specific legislation,—I cannot think that, in the absence of all precedent, and of any judicial decision or authority applicable to the present purpose, we should be justified in holding an offence, committed under such circumstances, to be punishable by the law of England, especially as in so holding we must declare the whole body of our penal law to be applicable to the foreigner passing our shores in a foreign vessel, on his way to a foreign port. I am by no means insensible to the argument *ab inconvenienti*, pressed upon us by the Solicitor-General. It is, no doubt, desirable, looking to the frequency of collisions in the neighborhood of our coasts, that the commanders of foreign vessels, who, by unskilful navigation or gross want of care, cause disaster or death, should be as much amenable to the local law as those navigating our own vessels, instead of redress having to be sought in the, perhaps, distant country of the offender. But the remedy for the deficiency of the law, if it can be made good consistently with international law,—as to which we are not called upon to pronounce an opinion,—should be supplied by the action of the legislature, with whom the responsibility for any imperfection of the law alone rests, not by a usurpation on our part of a jurisdiction which, without legislation, we do not judicially possess. This matter has been sometimes discussed upon the assumption that the alternative of the non-exercise of jurisdiction on our part must be the total impunity of foreigners in respect of collision arising from negligence in the vicinity of our coast. But this is a total mistake. If by the assent of other nations the three-mile belt of sea has been brought under the dominion of this country, so that, consistently with the rights of other nations, it may be treated as a portion of British territory, it follows as a matter of course that Parliament can legislate in respect of it. Parliament has only to do so, and the judges of the land will, as in duty bound, apply the law which Parliament shall so create. The question is, whether legislative action shall be applied to meet the exigency of the case, or judicial authority shall be strained and misapplied in order to overcome the difficulty. The responsibility is with the legislature; and there it must rest. Having arrived at this conclusion, it becomes necessary to consider the second point taken on the part of the crown; namely, that, though the negligence of which the accused was guilty occurred on board a foreign ship, yet, the death having taken place on board a British ship, the offence was committed within the jurisdiction of a British court of justice. This is the point insisted on by my brothers Denman and Lindley, with the somewhat hesitating and reluctant assent of the Lord Chief Justice of the Common Pleas. I dissent altogether from their opinion. In considering this question, it is necessary to bear in mind—which I am disposed to think has not always been done—that we must deal with this part of the case without any reference to the theory of the three-mile zone, and (as was very properly admitted by the Solicitor-General) as though the two ships had met, and the occurrence had happened, on the ocean.” Having entered fully into the authorities on this head, the Lord Chief Justice proceeded: “But for the opinion expressed by my brother Denman, I should have thought it beyond dispute that a foreign ship, when not in British waters, but on the high seas.

was not subject to our law. Upon this point I had thought that all jurists were unanimous, and could not have supposed that a doubt could exist. Upon what is the contrary opinion founded? Simply upon expediency, which is to prevail over principle. What, it is asked, is to happen if one of your officers, enforcing your revenue laws, should be killed or injured by a foreigner on board a foreign ship? What is to happen, if, a British and foreign ship meeting on the ocean, a British subject should be killed by a shot fired from a foreign ship? In either of these cases would not the foreigner guilty of the offence become amenable to English law? Could it be endured that he did escape with impunity? If brought within the reach of a British court of justice, could he not be tried and punished for the offence; and ought he to be permitted to escape with impunity, or ought he not to be tried and punished for such offence? My first answer is, that the alternative is fallacious. He will not 'escape with impunity.' He will be answerable to the laws of his own country; and it is not to be presumed that the law of any civilized people will be such or so administered, as that such an offence should escape without its adequate punishment. As regards the amenability of the offender under such circumstances to our own law, it will be time enough to determine the question when the case arrives. If the conviction and punishment of the offender can only be obtained at the sacrifice of fundamental principles of established law, I for one should prefer that justice should fail in the individual case, than that established principles, according to which alone justice should be administered, should be arrested and strained to meet it. I think, therefore, that both exceptions taken on the part of the crown to the general rule, that a foreigner committing an offence out of the jurisdiction of a country which is not his own, cannot be brought to trial in the courts of the former, thus failing, it appears to me that the general rule must prevail, and that the defendant, having been a foreign subject, on board a foreign ship, on a foreign voyage, and on the high seas, at the time the offence was committed, is not amenable to the law of this country; and there was, therefore, no jurisdiction to try him, and that, consequently, the conviction was illegal. In the conflict of opinion which unfortunately exists, it is a great satisfaction to me to be able to add, that the late Mr. Justice Archibald, whose loss the whole profession, and especially those who had the advantage of his intimacy or acquaintance, must deeply lament, and whose loss as a most learned, enlightened, and conscientious judge, the public has so much reason to deplore, having seen my proposed judgment, communicated to me his entire concurrence, both in the conclusion at which I had arrived, and the grounds on which it is founded. His opinion, as he is no more, cannot, of course, be of any avail to the defendant; but as without it the majority of the court are of opinion that the conviction should be quashed, it must be quashed accordingly."

Mr. Justice LUSH said: "I have already announced, that, although I have prepared a separate judgment, I did not feel it necessary to deliver it; because, having since perused the judgment which the Lord Chief Justice has just read, I found that we agreed entirely in our conclusions, and that I agreed in the main with the reasons upon which those conclusions are founded. I wish, however, to guard myself from being supposed to adopt any words or expressions which may seem to imply a doubt as to the competency of Parliament to legislate as it may think fit for these waters. I think that usage and the common consent of nations, which constitute international law, have appropriated these waters to the adjacent State, to deal with them as the State may deem expedient for its own interests. They are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes denoting that this belt of sea is under the exclusive dominion of the State. But the dominion is the dominion of Parliament, not the dominion

of the common law. That extends no farther than the limits of the realm. In the reign of Richard II. the realm consisted of the land within the body of the counties. All beyond low-water mark was part of the high seas. At that period the three-mile radius had not been thought of. International law, which upon this subject at least has grown up since that period, cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by act of Parliament. As no such act has been passed, it follows that what was out of the realm then is out of the realm now, and what was part of the high seas then is part of the high seas now; and upon the high seas the admiralty jurisdiction was confined to British ships. Therefore, although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm; and any exercise of criminal jurisdiction over a foreign ship in these waters, must, in my judgment, be authorized by an act of Parliament."

Touching the point that the crime was committed on board an English vessel, a correspondent of the *Times* sends to that paper the following letter:—

"SIR,—The case of the *Franconia* has naturally excited great attention. The point decided is of the highest importance, and the judges, after hearing it twice argued, are nearly equally divided upon it. In such circumstances, it is scarcely credible that any thing has been overlooked; yet I do not find in your full report, nor in the report of your contemporaries, any reference to a precedent that appears to bear directly upon the controversy.

"Nearly one hundred years ago, a man firing from the shore killed another, one hundred yards off at sea. The question arose, whether the offence was committed at sea or on land. If at sea, it came under the admiralty jurisdiction; if on land, it was triable at the assizes in the county. The point was ordered to be argued before all the judges of England in the Exchequer Chamber, and it was so argued on the 25th of November, 1785; a second argument was ordered, and that was held before all the judges except Lord Loughborough, at Serjeant's-inn, on the 20th of January, 1786. The *Times* had not then come into existence, and the report is most meagre; but the marginal note in Leach's Reports says it was held 'that the offender shall be tried by the admiralty jurisdiction; for the offence is committed where the death happens, and not at the place from whence the cause of the death proceeds.' In 1 East, P. C., the only other report, it is said, referring to a MS. of Mr. Justice Buller, that 'all the judges held that the trial must be at the admiralty court, and not at common law.'

"If this precedent, which is cited without any expression of doubt in all the text-books, is valid, it governs, or ought to govern, the *Franconia* case. The offence was committed on board the English ship run down, and not on board the German ship, and Kuhn was liable to our law without any reference to the three miles limit and the accumulated learning on that head. And I venture to think that this is good sense. The principle of our criminal law—the very foundation of manslaughter through negligence—is, that a man's will accompanies his act into all its natural and probable consequences; and if I fire across the frontier of a country and kill a man, or set a train at the same distance to blow him into the air, or send poisoned sweets about by post, the offence is consummated and tried where the attempt takes, or is designed to take, effect.

"It is at least noteworthy, that, if the judgment in the *Franconia* case is right, a foreigner passing our shores might deliberately take a pot shot at an Englishman on shore, and kill him, without being liable to our jurisdiction.

"Your obedient servant,

C.

"Lincoln's-inn, November 14."

A telegram from Hamburg announces that criminal proceedings have been begun in that city against Kuhn; so that he seems not likely to escape altogether.

**THE COURTS OF APPEAL.** — No time seems to have been lost in the appointment of judges to the Ultimate and Intermediate Courts of Appeal, under the new Judicature Act. Mr. Justice Blackburn, senior puisne judge of the Court of Queen's Bench, and Mr. Edward Strathearn Gordon, the Lord Advocate, have been appointed lords of appeal in ordinary, and have been made peers for life, under the titles, respectively, of Baron Blackburn of Killearn, and Baron Gordon of Drumearn.

At the same time, three puisne judges of the English bench, Mr. Justice Brett, Mr. Baron Bramwell, and Mr. Baron Amphlett, have been elevated to the Intermediate Court of Appeal.

These appointments have met with universal approval. The *London Law Journal* says: —

"The promotion of Mr. Justice Blackburn to be a lord of appeal will be received with universal approbation. For many years his lordship has been before the profession and the public. His great rapidity of discernment, his learning, and his experience, are known to every one familiar with Westminster Hall. His keen sense of justice, love of right, and high-mindedness, cannot be too highly appreciated. His one fault — namely, excessive eagerness to get at the point of the case, and to leap to a conclusion on it — will disappear altogether in the serene atmosphere of the House of Lords. His lordship will be much missed in Westminster Hall. Some members of the bar were repelled by the brusque manner of the learned judge; but all men capable of seeing beneath the surface found in him the true spirit of a gentleman, the kindest of natures, and the most generous of dispositions.

"The Right Hon. Edward Strathearn Gordon, Lord Advocate of Scotland, will be the other lord of appeal, and will supply the place so well filled by the late Lord Colonsay. The presence in the House of a judge thoroughly acquainted with the principles and practice of Scotch jurisprudence is essential, and Mr. Gordon is well qualified to aid their lordships in this respect.

"We suppose that the selection of Baron Bramwell, Mr. Justice Brett, and Baron Amphlett, to be judges of the Intermediate Court of Appeal, will be generally admitted to be wise. Indeed, the appointment of Baron Bramwell and Mr. Justice Brett was a foregone conclusion, while the addition of Baron Amphlett will equalize the common law and equitable forces in that tribunal. Baron Bramwell has for many years been one of the special favorites of the profession. With the bar, his popularity could not stand higher. No one who has ever practised before him, whether as a leader or a junior, will forget his consistent courtesy and abundant supply of good humor, or will fail to acknowledge that lofty sense of honor with which his lordship has been ever actuated. In losing him from the High Court of Justice, we have the consolation of knowing that a vast harvest of appeals will still bring the bar into continual contact with him. The solicitors and the suitors have been equally proud of his lordship's talent, discretion, courtesy, and impartiality, and all will wish him well in his new career.

"Mr. Justice Brett and Baron Amphlett belong to a younger generation of judges; but the former, at a very early stage of his judicial life, displayed remarkable force of character, coupled with great knowledge of business, and thorough acquaintance with the principles of the law. No one, indeed, has excelled Mr.

Justice Brett in knowledge of the general affairs of life, and of every thing connected with the trade of the country. Baron Amphlett has ever shown himself a laborious and painstaking judge, and we doubt not that he will render much help in the Court of Appeal."

It seems likely that the real work of deciding the law will hereafter be done in the courts of appeal.

**MR. JUSTICE QUAIN.**—Sir John Richard Quain, one of the justices of the Queen's Bench Division, died in September, after a long illness, at his residence in London. He was appointed early in 1872, and soon after was knighted. He bore, at the time of his appointment, a great reputation as a commercial lawyer on the Northern Circuit, and it was not impaired during his career as a judge. He possessed, too, a wide knowledge of general jurisprudence. During his life, he took great interest in the improvement of legal education, and it is said he has bequeathed the sum of £10,000 to trustees, to be applied to that purpose.

**MR. JUSTICE ARCHIBALD.**—Still another vacancy has been caused by the death of Sir Thomas Dickson Archibald, one of the judges of the Common Pleas, Oct. 18. Judge Archibald was born in Nova Scotia in 1817, and received his early education there. Removing to England, he entered as student at the Middle Temple, and in 1852 was called to the bar. In 1868 he was selected as junior common-law counsel to the treasury. In that capacity he was engaged in several important matters, notably in the preparations for the prosecution of the "claimant" for perjury. In November, 1872, he was appointed to the Queen's Bench, whence, in 1875, he was transferred to the Common Pleas.

Speaking at the Lord Mayor's dinner, Nov. 9, of the death of Judges Quain and Archibald, the Lord Chancellor said :—

"I cannot but take the first public opportunity of expressing the profound regret which I, in common with the whole legal profession, feel at the loss which we have recently sustained by the death—I must say the untimely death—of two of the youngest, the most vigorous, and the most efficient judges of the Supreme Court. There never was a time when services like theirs could with greater difficulty be spared. We are passing through a crisis of extensive legal changes, and we stand in need of every possible contribution of wisdom, of experience, of patience, of forbearance, to make those changes fit and harmonize with our ancient system of judicature. I suppose that a simple and inexpensive system of procedure must always tend to increase litigation; and, if the recent changes are to be tried by this test, they must have been most signally successful in their operation; for whereas we understand that there is scarcely any trade or occupation in this country which is not suffering from a greater or less degree of depression, I believe I am right in saying that the quantity of business which stands at this moment at the disposal of the various courts of justice is greater than it has been at any previous time."

**HIGH COURT OF JUSTICE.**—The vacancies occurring by the promotion of Mr. Justice BLACKBURN, and the deaths of Mr. Justice QUAIN and Mr. Justice ARCHIBALD, have been filled by the appointments of Mr. HENRY HAWKINS, Q. C., Mr. HENRY MANISTY, Q. C., and Mr. HENRY CHARLES LOPES, Q. C., respectively.

The appointment of Mr. LOPES (who was called to the bar in 1852, and made queen's counsel in 1869) is, says the *Law Times*, colorless, from a professional point of view.

Mr. HAWKINS was called to the bar in 1843, and made queen's counsel in 1858. He has had a large experience of court business, and, "if not a profound lawyer, possesses a capacity for comprehending points of law, which is very nearly as valuable as the actual knowledge." Mr. MANISTY was called to the bar in 1845, and made queen's counsel in 1857. He enjoys at the bar a high reputation as a sound lawyer. It is matter of regret, says the *Solicitors' Journal*, that his "appointment was not made at least ten years ago." Both Mr. HAWKINS and Mr. MANISTY were most warmly greeted at the reopening of the courts, after the long vacation.

It is understood that Mr. Justice HAWKINS will be transferred to the Exchequer Division. Hereafter, all newly appointed judges will be sworn in in the Queen's Bench Division, and thence be transferred to the other divisions, as occasion may require.

VICE-CHANCELLOR STUART. — The Right Honorable Sir John Stuart, for many years a Vice-Chancellor, died Oct. 29, aged eighty-three. He was educated at the University of Edinburgh. He was called to the bar at Lincoln's Inn in 1819, and was made queen's counsel in 1839. In 1852 he was appointed to a vice-chancellorship, an office which he held till his resignation in 1871. It was said at the time of his retirement that the state of the business of the court had never been in a more satisfactory condition; and that the many important questions which had come before him had been "adjudicated upon with perspicuity of intellect, accuracy, and extent of learning, acuteness of thought, and, above all, with a steadfast adherence to those sound principles which were laid down by the fathers of equity, — Lord Hardwicke, Lord Eldon, and Sir William Grant, — as the landmarks of equity jurisprudence."

CROSS-EXAMINATION TO CREDIT. — The coroner's inquest in the Bravo case, which, while accomplishing next to nothing of the purpose it was set to accomplish, contrived needlessly to blacken the reputation of two or three persons who came before it as witnesses, seems to have kindled afresh the discussion which was provoked by the Tichborne trial, when the right of cross-examination was undoubtedly pushed to its extreme limit. As a consequence, several leading English papers have made the matter the subject of leading articles, which deal with a condition of things which we can but think more fanciful than real. Says the *Pall Mall Gazette* : —

"Every man is liable to be brought into court as a witness; and every witness gives evidence that must be more or less favorable to one side or the other in a litigation. But the side to which a witness is unfavorable claims the right of submitting the adverse testimony to an ordeal known as 'cross-examination to credit.' In addition to questions relating to the actual subject-matter of the inquiry, the cross-examining counsel is allowed to put two classes of questions which cannot strictly be regarded as relevant, and which may be either a most efficient and harmless instrument for eliciting truth, or the machinery for inflicting cruel and unnecessary torture.

He may ask any questions which tend to test the accuracy, veracity, and credibility of the witness, or to shake his credit by injuring his character; and the witness 'may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself,' unless the answer 'would, in the opinion of the judge, have a tendency to expose the witness to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for.' This is a succinct statement — from Mr. Stephen's lately published Digest — of the existing law, so far as it is expressly defined by the text-writers and cases. Any thing short of an admission of a crime may be wrung from the witness under a 'cross-examination to credit.' A man or woman who has lived a blameless life for years, and who has been called to testify to some plain and simple matter of fact, may be forced to admit that he or she had been guilty of some grievous moral lapse at some distant period. A man may be compelled to confess to having committed adultery twenty years ago, a woman to having been seduced ten years ago, and this, possibly, in the presence of the innocent and trusting children or parents of the guilty, who had vainly hoped to cover up their early fault with long repentance and the gathering dust of time. Or it may be that the fact disclosed, though not creditable, as barely stated, to the character of the witness, would be susceptible of much mitigation, could all the circumstances be explained. Such an explanation, however, is in most cases too evidently out of the question. To go back twenty or ten years for apologies and qualifications is generally beyond the power, if not beyond the grasp of memory, of ordinary men; nor could the process of mitigation be introduced into an alien inquiry. The witness who is cross-examined to credit, and has admitted any facts from which unfavorable inferences can be drawn, is branded irremediably in the eyes of the world, and, perhaps, degraded for ever in the opinion of those who are nearest and dearest to him. And this penalty is inflicted not because he has sinned, neither by public justice nor by private vengeance, but simply because he has had the misfortune to be asked to testify to some obvious and recent fact. In not a few semi-barbarous countries a dying man will be allowed to perish by the roadside, not because the passers-by are more inhuman than other men, but because a bad system of justice and police imposes heavy responsibilities and exacts difficult explanations from all persons who are found in possession of a corpse. Something of the same kind will be a very probable result of the license of cross-examiners in this country, if it be allowed to assail individual character unchecked. At present we are all the allies of public justice. A man who knows any thing bearing upon a crime is, as a rule, very willing to tell his story in open court. But how long is this willingness likely to stand the trial of such attacks upon the credit of witnesses, as we have lately seen in more than one notorious case?"

We said we altogether doubt whether the condition of things in an English court is fairly represented by the *Gazette*. But if it is, we do not see that the remedy it proposes is adequate. The *Gazette* has recourse to Mr. Stephen's rules on the point in the Indian Evidence Act as the "nearest approach to a workable settlement" of the matter. These rules provide that —

"In exercising its discretion, the court shall have regard to the following considerations: —

"1. Such questions are proper, if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies.

"2. Such questions are improper, if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation



would not affect, or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies.

"3. Such questions are improper, if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence."

These rules, however, amount to little more than a description of legal discretion. But the whole trouble, according to the *Gazette*, has grown out of the presumption of the bar "and the timidity of the bench." If this be so, then the judges and not the law need attention, unless, indeed, discretion is to be wholly taken from them.

LETTING ROOMS. — IMPLIED COVENANT. — *J—— v. K——*. — City of London Court. — "A somewhat novel and interesting point of law," says the *Law Times*, "arose in this case. The facts, which were substantially undisputed, were, so far as is necessary for the purposes of this report, as follows: The plaintiff was a solicitor, and the defendant a barrister, having his chambers in the Temple. On the 3d July last, the plaintiff, being in search of offices, went to see the defendant's rooms, part share of which he had advertised to be let, and expressed himself satisfied with them, but asked till the evening of the same day to come to a final conclusion. Upon this occasion it appears that the defendant said to the plaintiff, 'I hope, Mr. J., you are a moral character, and will have no improper persons here;' to which the plaintiff replied, that he was a married man, and merely wanted the rooms for the purpose of carrying on his business. On the same evening, plaintiff sent defendant a check for six months' rent in advance, but when he went to the chambers two days afterwards to commence his tenancy, the defendant informed him that he was in the habit of receiving the visits of an 'actress' there, and asked whether that would be any objection." The plaintiff was very much astonished at what he heard, and, after some consideration, reminded the defendant of what he had said at the first interview, and, under the circumstances, asked for the return of the six months' rent. This the defendant refused, and after some futile attempts at a compromise, the present proceedings were instituted for the recovery of the money paid. Upon these facts, the counsel for the plaintiff argued, that, although in the case of land or an unfurnished house being let there was no implied covenant that it should be fit for the purpose for which it was required, or for habitation (*Hart v. Windsor*, 12 M. & W. 68; *Sutton v. Temple*, id. 52), yet, that where offices or furnished apartments or lodgings were taken, there was an implied covenant that they should be reasonably fit for use and occupation (*Smith v. Marrable*, 11 M. & W. 5; *Campbell v. Lord Wenlock*, 4 F. & F. 716); and that, if they were not, so that the tenant was deprived of all beneficial enjoyment, he was entitled to rescind the lease or agreement, and take proceedings for its breach. Here the defendant knew that the chambers were required for professional purposes, and as it subsequently appeared, by his own confession, that they were unfit for such purposes, he was bound to return the rent. The counsel for the defendant urged that the occasional presence of an 'actress' in the chambers did not, in point of law, justify the plaintiff in rescinding the agreement. The 'actress' might not be in the chambers

when the plaintiff was using them. The court, however, was clearly of opinion that common sense, as well as law, was in favor of the plaintiff's contention. He should decide for the plaintiff, for the full amount claimed, with costs."

## CANADA.

ADMIRALTY. — COLLISION. — *The Frank*, Petersen, master. — This case, which was lately decided in the Vice-Admiralty Court at Quebec, involved a question of fact of much importance. A Norwegian bark, the *Frank*, while crossing the Grand Banks, in a fog, ran down and sunk an American fishing-schooner, the *Job Johnson*, which was lying at anchor. In suit to recover for the loss of the schooner, the court found, as a fact, that the bark was negligent at the time of the accident, in that she was sailing at too great speed, considering the weather. The bark, however, imputed fault to the schooner for sounding a fog-horn instead of ringing a bell, as directed by the sailing regulations for a vessel at anchor, whereby the bark was misled. The court held that a fog-horn was not a legal substitute for a bell; but found, as a fact, that the omission to ring a bell did not contribute to the accident. On this part of the case the court (STUART, J.) says: —

"I now take up the charge against the schooner for not ringing a bell, which the second mate of the bark has said would have enabled him to avoid the schooner, as he would then have ported his helm and have kept it to port. The fog-horn's blasts were thus, according to him, the cause of the accident.

"By orders in council issued in pursuance of the fifty-eighth section of the Merchant Shipping Act, Amendment Act, 1862, the regulations for preventing collisions at sea, appended to an order in council dated 9th January, 1863, have, with the assent of the United States of America, been made to apply not only to sea-going ships of that country, but to ships of the United States when navigating the inland waters of North America, whether within British jurisdiction or not. See App. to Lush. R. 72; B. & B. Lush. 482. The same regulations have likewise been made applicable to Norwegian ships. 2 Stuart's Adm. R. App. p. 325. The tenth article, governing fog-signals, provides that sailing-ships under weigh shall use a fog-horn, and, when not under weigh, shall use a bell.

"To relieve the schooner from the observance of this rule, a regulation, said to proceed from the United States government at Washington, has been produced. It is in the form of a circular addressed to the Collectors of Customs, signed by Mr. Richardson, the Secretary of the Treasury at Washington; it bears date the 18th October, 1878, and is as follows: —

"You are instructed to issue to each sailing-vessel, with its proper regulation papers, two copies of this circular, and to endeavor to enforce the provisions contained in the resolution given below of the Board of Supervising Inspectors of Steam Vessels: —

"Be it resolved, that the President of the Board of Supervising Inspectors respectfully request the Secretary of the Treasury to instruct Collectors of Customs on the seaboard and lakes to issue to each sailing-vessel, with its proper regular papers, two copies of the fog-horn signal rules adopted by this board, to be framed under glass, and hung in some conspicuous place on said vessels. The rules referred to are as follows: —

"1. Whenever there is a fog, by day or night, the fog-signals described below shall be sounded.

"2. Sailing-vessels, and every craft propelled by sails upon the ocean, lakes, and rivers, shall, when on the starboard tack, sound one blast of their fog-horns; when on the port tack, they shall sound two blasts of their fog-horns; when with the wind free or running large, they shall sound three blasts of their fog-horns; *when lying-to or at anchor, they shall sound a general alarm.* In each instance the above signals shall be sounded at intervals of not more than two minutes."

"Mr. Howells, Consul of the United States at Quebec, has given a certificate that this circular would be received by any collector of customs or similar officer of the United States as a genuine and authoritative order from the Department of the Treasury. He has been examined also to prove the signature of the Secretary of the Treasury at Washington, and has said that this regulation was made by a board of supervising inspectors under an act of Congress, which, he believes, is the same as stated in Nos. 4404 and 4405 of the Revised Statutes of Congress, 1873-74. I have looked at this citation, and do not find any power there delegated to inspectors to alter the sailing regulations established between England and the United States, but I see there a power given to inspectors to regulate steam-vessels. I do not think, therefore, that the schooner *Job Johnson* was relieved by this circular from the ringing of a bell. Great Britain and the United States, as well as this Dominion, have adopted the sailing regulations. They have been made to apply not only to sea-going vessels, but also to the great lakes bordering on the United States and Canada. Norway has assented to them, with many other European powers; and it is very much to be regretted if the fishermen on the banks of Newfoundland have been misled by the circular. It has been proved in this case that the fog-horn is in use on the banks, and men of long experience there, as fishermen, say that they have never known the bell to be used. The term 'general alarm' directed by the circular, as applied to a small fishing-schooner, to be created every two minutes upon the Atlantic Ocean, is a term of doubtful meaning. I should hardly imagine it to be a fog-horn, unless accompanied by other sounds, perhaps not within the power of a small vessel to make. If I have particularly alluded to this part of the case, it is because a departure from any one of the sailing regulations, no matter what, whether for a better one or an equivalent, may mislead other vessels. If other vessels are misled, — and it is easy to conceive such a case, where a bell is not rung and a blast of a fog-horn substituted, — the deviation may have a disastrous effect upon important interests. A more lamentable case than the present cannot be found, if the persons interested are to be deprived of their remedy in consequence. If there is a class of men whose industry, attended with constant exposure of their lives, furnishes an indispensable article of food to a large portion of the human race, requires protection, it is the fishermen of Newfoundland; and it is to be hoped, that if they are laboring under ignorance of the law, that they should be informed of it."

It hardly needs to be added, that the state of things disclosed by this case should receive instant attention.

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## THE WASHINGTON "SAFE BURGLARY" CONSPIRACY.

THE Washington "Safe Burglary" Conspiracy well deserves to be classed among celebrated cases. The parties to its conception and its execution, or to its non-professional defence before Congress and the courts, embraced all ranks of society, from the lowest order of thieves to the very aristocracy of cracksmen; from the detectives who co-operated with all these, to the principal subordinates and to the chief of the government's Secret Service force; from the vile order of lawyers, — if they can be styled such without profaning the title, — through whom thieves negotiate with officers of the law, to the United States District Attorney, in the very capital of the nation; from the detective force of the city to its Board of Metropolitan Police; from cooks and waiters in the Washington Club to the contractors and splendid jobbers who feasted and plotted around its tables; from the lowest order of politicians to State officials of high degree and great pretence of respectability; from committee clerks to representatives and senators in Congress; and, lastly, from employes of low grade in the Executive Department to the official household of the President. Representatives from all these classes were either engaged in concocting and executing the crime, or in equally reprehensible and long-continued efforts to save its perpetrators from punishment, not through the proper methods of retained counsel, but by the corrupt means which political workers can command. Some of the persons thus indicated appeared dimly in the conspiracy, but with sufficient distinctness for full identification.

The matter was first partially investigated by a committee of Congress, then by the Treasury Department and the Department of Justice; was tried next before the criminal court of the District of Columbia; was again investigated by a committee of Congress, and tried a second time in the District Court. The facts established by these various inquiries have not as yet been collected and arranged in proper order. The present article is an attempt so to collect and arrange them.

The safe burglary was one of the many weapons by which the long notorious "District Ring" sought to paralyze the efforts of those citizens who were trying to expose its corruptions. This Ring had several times defeated investigation, through its firm hold upon prominent politicians in each party. Its success had made it confident, insolent, unscrupulous, and defiant. But during the summer of 1873 an attack of such power was made upon it by the independent press, as precluded interference in its behalf on the part of politicians, and forced an investigation. There were some weak efforts in each House to oppose a resolution of inquiry, and, after it passed, bold attempts were made to pack the committee which was ordered. But at length these all failed, and this gigantic Ring was brought face to face with a joint committee of Congress, which voted to conduct an open investigation, and admitted to its sessions the active correspondents of the press which had waged such effective war against the Board of Public Works.

The investigation had been ordered upon the request of a number of leading citizens of the District of Columbia; and these memorialists selected Mr. Columbus Alexander, a man of wealth, prominence, and unsullied character, to appear with counsel, and represent them before the committee. Mr. A. R. Shepherd, governor of the District, also attended with counsel, in behalf of the Board of Public Works, of which he was president. The secretary of the District, Mr. Richard Harrington, who was also Assistant United States Attorney for the District of Columbia, and, in practice, the actual District Attorney, appeared as one of the governor's counsel. Mr. Harrington was a young gentleman of noted family in Delaware, who had advanced rapidly at the bar of the District, and was a general favorite with the judges of the court, with his seniors in the profession, and with a large circle of friends. He had high hopes and laudable ambitions, and a brilliant future seemed opening before him.

The investigation was ordered in February, 1874, and the examination of witnesses began March 5th. A week or ten days later it became evident to the Ring that the inquiry would be a thorough one. Among the first witnesses called was John O. Evans, the most prominent contractor under the Board. Upon being ordered to produce his books, although he had been carrying on immense contracts, he presented a few small ledgers, in which were scant entries that threw no light upon his real transactions. These books, though purporting to have been in constant use for many months, were entirely new, and the entries in them were of most suspicious freshness.

Mr. Alexander, in behalf of the memorialists, denounced these books as spurious, and the conduct of those presuming to palm them off on a committee of Congress as insolent and audacious. The anxiety displayed by the memorialists to obtain the real books of Mr. Evans seems to have suggested the conspiracy which resulted in what is now so widely known as the Washington Safe Burglary. The theory of the plot, since fully proved, was, that if the memorialists could be placed before Congress and the country as allied with thieves and skilled cracksmen, employing them to commit burglaries, and blow open and rob safes in desperate attempts to secure evidence against the Board, they would be disgraced at the outset, and rendered powerless for harm. It was further contemplated so to arrange the conspiracy as to secure the arrest of Mr. Alexander, and possibly the other prominent memorialists, who were accustomed to meet nightly at his residence, by tracing those who were acting the part of burglars to his house, and arresting the whole as accomplices, while the pretended thieves were delivering a lot of Evans's stolen books. With Harrington as prosecuting attorney, the memorialists in jail, and the thieves as witnesses for the United States, it was believed such a storm of indignation could be raised against the methods adopted by the enemies of the Board as would justify Congress in repudiating the memorialists, and abandoning the investigation in disgust. To the execution of such a scheme, it was necessary to have full control of the building from which the books were to be taken. Such a place was the office of the United States District Attorney, which was practically under the control of Mr. Harrington; and it was decided that his safe should be filled with such books as the memorialists had shown a desire

to obtain, should be then blown open by burglars, and the contents be carried to Mr. Alexander's house.

It seems incredible that the earliest traces of such a conspiracy should be found in the White House. But upon this point the evidence is clear. General Babcock, the secretary of the President, in his capacity as Commissioner of Public Buildings and Grounds, had been charged by law with making certain measurements of work done under the Board of Public Works, upon which large sums of money had been paid. The memorialists charged that these measurements were grossly in excess of true computations; and thus the investigation which they were prosecuting was directed also against General Babcock.

Soon after the inquiry ordered by Congress was fairly opened, General Babcock called on Mr. Banfield, Solicitor of the Treasury, who, under the Secretary, has immediate direction of the Secret Service Division of that department, and asked to have Colonel Whitley, the chief of that Division, whose main office was in New York, aid in his defence. Colonel Whitley and his force had previously performed a variety of detective work for the President's secretaries, and the relations between the force and the subordinate officials about the White House were intimate. As an instance: in 1871, Babcock sent W. D. Moore, then an assessor of internal revenue in Texas, with a letter to Whitley, saying, Moore had in charge a matter of interest to all of them. Whitley at once placed it in the hands of Nettleship, his chief assistant. As appeared from the letters of these three persons, it was a plan for kidnapping Mr. Perry, formerly commercial agent in San Domingo, from Providence, R. I., and taking him to Texas, to answer a charge of murder, which had been trumped up by Moore, in order to imprison Perry and prevent him from appearing as a witness before the Senate committee then investigating the San Domingo affair. This plot failed. Subsequently Moore figured prominently in connection with Babcock's defence in the late whiskey trials, and in still later efforts to defame Secretary Bristow. Soon after the latter resigned, Moore, in accordance with an order from the White House, was promoted to be the chief of special agents in the Treasury Department.

In accordance with Babcock's request, the order was given to Colonel Whitley, who reported on the 11th of March, promising to

do all he could. On the 14th Babcock asked Solicitor Banfield to telegraph Whitley, who had gone to New York, to return that night and call the next morning at Babcock's house to meet Harrington at breakfast. Whitley came, but was too late for the breakfast. Finding Babcock at the White House, he was directed by him to go to the Washington Club House, where he would find Harrington, who would tell him what was to be done. Banfield accompanied Whitley, found Harrington, and a full consultation took place between the last two named. Here was the firm foundation for the conspiracy, without which it would have been impossible to erect the superstructure; for the secret service force of the government could not have been commanded for such work unless its chief had been thoroughly convinced that he could rely upon support and protection from what seemed the power next the President himself. It was not until a very late day in the investigation of the case that the above facts in regard to General Babcock came to light, and formed the basis of his indictment. They were admitted; but as the evidence did not prove that he mentioned the safe burglary to Whitley, it was claimed that he sent for the latter to help him in other ways, and that if Whitley and Harrington afterwards concocted the safe burglary, it was without Babcock's knowledge and he was in no way responsible for it. Evidently, however, with the full knowledge of the leading spirits in the District Ring, but under the more immediate direction of Harrington, the plot developed rapidly. Whitley worked boldly, as one enjoying perfect immunity. He not only put his chief assistant, Nettleship, upon the job, but other prominent operatives in the force; and even two detectives, occasionally employed, — namely, Michael Hayes and Gustave Zirrueth, — were assigned parts in the work.

The conception of a crime designed so to blacken the reputations of prominent and honorable citizens as to render them infamous, and not only effectually to disgrace them, but to insure their arrest and imprisonment, is sufficient proof that those who originated and encouraged it were capable of blacker deeds than the bitterest enemies of the District Ring had ever charged upon it. The boldness which marked all their dealings may be measured by the unhesitating manner in which they employed the whole machinery of the government's secret service force, the power of the United States Attorney's office for the District where



Congress was sitting, the police force of the District, and a company of thieves and burglars, using them all under the very eyes of the government to defeat an investigation then in progress by the order of both Houses.

While Colonel Whitley was considering the best means of aiding General Babcock and the District Ring, the dispute occurred before the committee over the books produced by Evans, and the anxiety of the memorialists to obtain the originals became very clear to the Ring. This put an end to all hesitation over plans. Colonel Whitley returned to New York, and the arrangements for the safe burglary were promptly begun. After consultation with Nettleship, the latter went to his home in Newark, and employed Gustave Zirruth, a German residing there, who had formerly acted as a detective for Whitley, to come to Washington, and endeavor to open communication with Columbus Alexander, through Mr. Demaine, a German surveyor, who had been employed by the memorialists to test some of General Babcock's measurements. The results of these tests had shown outrageous discrepancies in favor of contractors and the Board; and while Demaine presented the means of easy access to Alexander, it would also be most satisfactory to the Ring if he too could be dragged down with the rest. Zirruth visited Washington, where he passed under the name of Miller, and, meeting Demaine, asked his advice about real estate and localities in the city, under pretence of buying property and establishing a beer saloon. Meanwhile, the memorialists were vigorously pushing their work before the committee, Nettleship was on the ground watching, and the scheme to crush them did not seem to progress rapidly enough under Zirruth. Whitley sent one Dart, a member of his force, to summon to his office a former detective in his service, named Michael Hayes, and arranged with him to start at once for Washington and report to Nettleship. Upon his arrival there, not finding the latter at the hotel designated by Whitley, Hayes telegraphed his failure to the chief. Soon, however, through a friend whom he happened to meet, Hayes found Nettleship, received full instructions, and was put in communication with Zirruth, who had already drawn Demaine into conversation about the Board of Public Works, the investigation in progress, and the missing books of Evans. Upon Hayes's arrival, Zirruth again met Demaine, and told him he had heard a friend

declare that he knew where these original books were, and that they could be obtained. Demaine was naturally interested; and a few days later Hayes was introduced, under the name of Butler, as the man who knew the whereabouts of the books.

Demaine was easily induced to present Hayes to Alexander. Hayes approached the subject with some skill, and tried to draw from Alexander a promise to pay largely for efforts necessary to procure the books. Alexander, however, said they were not buying testimony, and that he would pay only the cost of transportation, and such minor expenses as might be incurred in bringing the books to the city. He tried to ascertain from Hayes the location of the books, but without success, Hayes saying he might tell him at a subsequent interview. When this took place, the time for producing them was postponed nearly a week. Hayes then, under the direction of Nettleship, went to New York, and tried to hire a burglar of his acquaintance, who had been in state prison, to go on to Washington, and blow open the safe. This man refused, and Hayes telegraphed the decision to Nettleship. The latter, however, had also gone to New York to see about the matter, and on meeting Hayes told him he had engaged another man, and after pointing him out directed Hayes to return to Washington and see Alexander. Upon going to the appointed rendezvous, Hayes found two men instead of one; but Nettleship informed him that this was all right. The reason for this change is significant, as showing the intimate relations which exist between thieves and detectives, the government force not excepted. As the plot involved arrest and several weeks' confinement in jail for the burglar who should carry the books to Alexander's door, Bliss, the professional burglar who had been employed, declined to undertake this part of the job, because he was then wanted by the authorities for a robbery committed some time before in New Hampshire, and, if arrested in Washington, he might be identified and taken there. He therefore suggested Benton as one who could assist at the blowing open, carry the contents of the safe to Alexander, and spend a few weeks in jail for a liberal compensation.

Bliss, the professional employed by Nettleship, belonged to the aristocracy of burglars. He lived in a brown stone house in New York, drove a splendid team, owned a private box at the theatre, and employed a lawyer, one Somerville, as go-between in

the necessary negotiations which such gentlemen have with detectives and the other lower orders of law officials. This Bliss had been connected with some of the most noted and skillful bank robberies of later years, had served a partial term in Sing-Sing, and been pardoned out by Governor Dix upon the representation of Whitley, made through the Attorney-General, that his assistance and evidence were needed to convict parties who had robbed the Treasury at Washington. He had seen such service in the penitentiary as would disqualify him as a witness, if detected and called upon to testify; and this was one of the elements of their case which the conspirators did not neglect. On the other hand, the evidence of the one selected to carry the books to Alexander was wanted, and so a common thief, who could turn State's evidence, was chosen.

Thus the actors in the safe-breaking were upon the ground, and such relations with the memorialists and their engineer had been established as were thought sufficient to the consummation of the plot. It remained for Mr. Harrington and his co-conspirators to put his premises in order, and superintend its execution. This required, of course, the aid of the Metropolitan Police; and, as it would never answer to call them to make arrests during the actual progress of the burglary, it was necessary to lay some foundation in advance for mentioning the matter to the Chief of Police, and inducing him to adopt such line of action as Harrington should suggest.

Arthur B. Williams, a Washington lawyer, long a friend of Harrington, and formerly associated with him in defending petty criminal cases, but a man far below him in legal standing, was despatched to New York, ostensibly to look up Kirtland, afterwards a most notorious witness before the investigating committee, and the man who received \$72,000 for helping to obtain the noted De Golyer contract from Governor Shepherd, through a business partner of Shepherd's, though, as the evidence showed, without the knowledge of the latter. Whether Williams met him on this occasion does not appear; but about the same time Kirtland wrote to a friend in Washington: "I am perfecting a scheme that will, I expect, knock the legs out from under a certain crowd." This was on the 15th of April. The safe was blown open on the night of the 23d of April. On the 20th Williams was in New York, having been sent there by Harrington to

consult with Nettleship and Whitley. On the same day an anonymous letter was prepared, and mailed from New York to Harrington, purporting to come from a thief, and in thieves' language informing him that the writer had been engaged to "blow" his safe for \$500 and half the "swag;" but that after incurring an expense of \$80 for tools, he had been set aside, and in revenge wrote to tell Harrington of the plot. The letter further named the 22d or 23d as the time when the safe was to be robbed; and added, that the person at the bottom of the whole thing, the "head bloke," lived in Washington, and if Harrington would watch and follow the parties, or, as the letter read, "pipe them off," he could ascertain the truth of what was written. Harrington received this letter on the 21st, and having ordered Williams home by telegraph, and requested Nettleship to come with him, the immediate actors in executing the plot were all assembled in Washington.

On the 22d, by direction of Nettleship, Hayes visited Harrington's office, was shown by him into the back room where the safe was, and left alone a short time. After a few moments Harrington returned, when Hayes, as he was instructed to do by Nettleship, asked some questions about counterfeiting cases, and was referred by Harrington to the Treasury Department. Under the arrangement made for purposes of safety, Hayes was to exchange no communication with Harrington on the subject of the burglary. On his asking for an appointment for the next day on some further business, Harrington named one o'clock. At that hour Hayes called with Bliss, the professional cracksmen, and the two were shown into the back room by Harrington and left alone. Bliss went at once to the safe, which had been left open, and made a careful examination of it. When Harrington entered, the conversation of the day before about counterfeiting was repeated with the same result, and Hayes and Bliss left. During the afternoon Hayes walked several times with Benton, the second man who had come from New York, over the route from Harrington's office to Alexander's residence, a distance of eight blocks. Benton's part was to help Bliss, and carry the contents of the safe, after Bliss had blown it open, to Alexander. The way was to be left clear for Bliss to escape, by the alley in the rear of the office. Benton was to ring and insist upon seeing Alexander, and, while delivering his goods, was to

be arrested, together with Alexander, and any one who might be with him. After a short time Benton was to be accepted as a government witness, discharged on bail, and allowed to escape. Bliss, during the day, coached Benton in what he was to say after arrest. After a suitable delay, and exhibition of reluctance, he was to "give Alexander away;" but be sure and do this either to Harrington or Clarvoe, the chief of the Washington detectives, who would be on the ground to make the arrest. Hayes also took word to Bliss and Benton, that they would find friends watching in the building. During the afternoon Harrington went to John O. Evans's office, and the two came together to Harrington's office with some of Evans's books, which were placed in the safe by Harrington. About dusk Hayes called at Alexander's, introduced Benton as the man who would bring him the Evans books that night, and made another attempt to have Alexander say he would pay money for them. Failing in this, he, in the presence and hearing of the thief, put words into Alexander's mouth, implying a previous promise to pay money; and left.

It seems to have been the impression that the job could be completed, and Alexander and all who were consulting with him that night be arrested and locked up before midnight, as a supper had been ordered at the Washington Club House by Harrington, where most of the prominent characters of the District Ring would be, doubtless to celebrate the downfall of the memorialists. Early in the evening Harrington had a consultation with Major Richards, the chief of Metropolitan Police, — who, without doubt, was in utter ignorance of the plot in which it was sought to have him play an unsuspecting part, — and showed him the anonymous letter from New York. He told Richards that the safe contained only papers without special value, and he was convinced, if the effort should be made to rob it, that it would be found it was done in the hope of procuring evidence to use against the Board of Public Works. Therefore, he did not want the robbers interfered with if they came, but desired them followed, and particularly any one who should bring out a bag or bundle. He expressed the opinion to Richards that no one but Columbus Alexander would put up such a job; and, if the thief should take the contents of the safe to Alexander's house, he wanted those following to let him go in, and if he came out without his bundle to arrest him, and also go in and arrest all who might be in

the house. Harrington further insisted that the watching should be confined to Richards, Clarvoe the chief of city detectives, and himself, explaining this by saying, that if the affair did not happen, or if they failed to connect any one of prominence with it, there would be every reason for keeping their preparations secret. To all this Richards agreed; and at eight o'clock the actors in the plot were in the vicinity of the District Attorney's office.

The locality deserves a passing notice. Mr. Harrington's office is upon a broad street-way caused by the intersection of two avenues and a street, in a thickly populated part of the city. It is only two squares from the most crowded intersection upon the principal avenue of Washington. The City Hall, with all its public offices, stands nearly opposite. The general head-quarters of the Metropolitan Police are only a few doors to the left, and street-cars run till late at night directly in front of the door. Mr. Harrington, however, was favored by the fact that he had full control of the building in which his office was situated. An alley opening in three directions ran in the rear, and through this it was arranged that the burglar Bliss should escape, while Benton came out in front and was followed to Alexander's house.

Soon after dusk the play began. Harrington, who had called Richards and Clarvoe to his house to talk the matter over, started with them for his office about eight o'clock. The moon was so bright that faces could readily be recognized at moderate distances. A little after eight Harrington conducted Richards into a small room at the end of the main lower hall, and behind the room in which the safe stood. Clarvoe came up to the street-corner nearest the office and stopped. As he arrived, two men standing there separated. Soon after they reappeared: one crossed the street and stood opposite the District Attorney's office; the other examined the outside of the building, looked into the basement to see if it was really closed, and entered the main hall. He came out almost immediately, and crossing the street "connected" with his companion. The one who entered the building was undoubtedly Benton, the thief; the other, as certainly Bliss, the cracksman. At this juncture A. B. Williams, who had been requested by Harrington to be present, appeared and joined Clarvoe. The same men came twice afterward at short intervals, one entering the building each time, and leaving it almost immediately.

Within, Harrington stood just inside the door of the small room where he and Richards had concealed themselves. In a short time some one entered the hall, came directly to the door of the small room, took hold of the knob, and either this man or Harrington opened the door. The latter said, "Is that you, Billy?" At this the man made some indistinct exclamation, and went out. Upon Richards expressing surprise at this, Harrington went out and soon returned, telling Richards it was a colored man looking for the janitor. In half an hour a man entered the hall, struck a match, and at once left. At eleven o'clock another person entered, walked directly back to the door of the room, and took hold of the knob. The door opened, and Harrington said again, "Is that you, Billy?" Richards was led to suppose that the person thus addressed was thought by Harrington to be "Billy" Evans, a clerk in the office. Richards, knowing that if these men were burglars they would not return for work unless the building were empty, insisted that it was useless to remain longer. At his suggestion Evans was despatched by Harrington to tell Parker, the janitor, not to come back that night. Evans was directed to the club-house, where Parker had been ordered to wait for Harrington. A crowd of prominent Ring officials, and a lunch, as well as Parker, were also waiting there for him. Upon leaving the building, Harrington suggested that they go hurriedly. This was probably notice to the operators outside that at last the coast was clear, as the waiting inside had doubtless been to inform them that the building was in the possession of friends. Clarvoe and Williams had observed the two men who first approached the building re-pass it twice, and one enter and leave as before. As Richards and Harrington passed out, they went quickly across the wide avenue in front of the office, towards two large bill-boards standing there against a tree. Upon approaching it Richards observed a man evidently watching the office. It was so light he could easily distinguish the expression of his features. As Harrington and Richards came up, he started directly across to the office they had left, passed it, and walked down to the corner; and when they in turn took up their position behind the bill-board just vacated by Bliss the burglar, the latter reappeared with Benton, both entered the office without hesitation, and closed the hall-door. In two or three minutes the watchers distinctly heard a crash as of the breaking of an inside door,

and soon after a person came to the window of the front office, raised the sash without an effort to do it quietly, and closed the blinds. Then for a short time every thing was still. Clarvoe and Williams had joined Richards and Harrington, and a brother of Governor Shepherd, who, coming along by accident soon after eleven o'clock, was stopped and informed of what was going on. After a little while, Richards with the rest crossed and stood directly under the windows of the office where the burglars were at work. The noise of filing iron and driving wedges could be plainly heard. Richards insisted upon going in to arrest them. Harrington protested stoutly, said he did not care for the safe, — which was not strange, since it belonged to the government, — but he wanted to follow these men, and see who had employed them to take papers from his safe. Richards was surprised to find from Harrington that no means had been taken to prevent escape from the rear; and, going to police head-quarters, a few doors away, he obtained the only man then available, armed and stationed him there, so as to cut off escape. Harrington tried to persuade Richards that this was not necessary, saying that an old man having a dog slept in the basement, and the burglars would hardly go out that way. But Richards insisted, and, sending after more men, placed three of the detective force in the alley with the first, with orders to watch and follow whoever might come out that way. As Bliss was to pass off by the rear gate, this arrangement bade fair to defeat the plan. So Harrington slipped quietly away, and personally ordered this watch to a point beyond where the alley-way divided and opened out on the two adjacent streets.

A few minutes after one o'clock there was a loud explosion, followed by the falling boards of a wooden partition, the crashing of glass, and the fall of plaster. Many residents in the vicinity were aroused, and came to their windows to ascertain the cause. Richards again insisted upon entering and arresting the burglars; but Harrington still protested so earnestly that he yielded, and the party arranged itself to follow the burglars. Harrington was particular in his directions to watch for the man who had a bag or bundle, and follow him closely. For some time there was perfect quiet inside. Bliss may have been determining whether he would risk the party, which he had not expected, in the alley. At half-past one the two men came out, and walked directly across toward the company watching. The moon being low, it



was difficult to distinguish a person clearly. As they came near the bill-board, it could be seen that one carried a satchel. At the corner near the board the men separated. All followed Benton except A. B. Williams, who seems to have walked along close to Bliss for a square, and, having seen him safely off into the darkness, turned to join the rest of the party, who were moving on through another street towards Alexander's with Benton a few steps in advance.

Williams seems to have had no trouble in finding the main party after he had disposed of Bliss ; for, although they had turned out of the street in which he saw them last, and into a different one from that he took after leaving Bliss, he moved rapidly up to where his street intersected the route to Alexander's, over which Hayes had shown the thief in the afternoon. Benton, after traversing half the required distance, lost his way. Richards testified that they followed with ordinary step ; that Benton from the first must have known they were following him ; that at times the thief and his followers were all mingled together ; and that after a time, Benton, evidently seeing he had lost his way, turned, and walking deliberately up to the crowd asked the direction to F Street, — this being the one on which Alexander lived. He was informed that it was the next street below. All then started in that direction, Benton in the rear. He soon repassed those in front, and, turning into F Street, walked on rapidly towards Alexander's, part of the crowd taking one side of the street and part the other, A. B. Williams kindly walking a few steps in advance of Benton, leading him directly to Alexander's house, and then taking up his watch a few doors beyond. Benton walked up the steps, and rang the door-bell at intervals for about twenty minutes. Failing to arouse any one, he left his bag on the steps, crossed to the opposite side, where Richards, Harrington, Shepherd, and Clarvoe were, and asked them if a man named Columbus — something lived over there. At this Harrington broke in, "Columbus Alexander?" and upon Benton's replying "Yes, that is it: that is the man I wanted to find," he added, that such a man did live there. With this, the thief walked deliberately back, rang several times again, then went down to the basement and rang there, the sound of both bells being distinctly heard by those watching at the extremities of the block ; Richards and his party being at one corner, and Williams at the other. Yet, though

eleven members of Mr. Alexander's family were at home that night, no one in the house was awakened. Referring to this in his closing argument on the trial, Mr. Riddle, of government counsel, said, "Speak of Providence! it was as if the angel of sleep held his benumbing fingers upon the pulses of all the inmates of that doomed house."

Thus, through this unforeseen and most unexpected circumstance, the diabolical plot failed. All other contingencies seemed to have been provided for by the conspirators, but the possible inability of a thief to ring up any one of such a family by persistent effort did not enter into their calculations. If the job had been completed as early as was intended, Benton would have found several of the memorialists and one or two of their attorneys with Alexander, a consultation having ended about eleven o'clock. Had Harrington with his *posse* reached the house in time, all these would have been arrested. Seldom outside of fiction do such escapes as this occur.

After the thief failed at the basement door, Richards, who began to suspect that the whole affair was a job in which he was playing the only ignorant part, insisted upon arresting the thief, and ordered Clarvoe to take him into custody. Upon this officer's approaching and asking Benton what he was doing, the latter said he had an appointment with the gentleman who lived there. As Clarvoe picked up the bag, the thief asked him to leave that, as it belonged there. He was then marched down to police head-quarters and locked up.

At this conclusion of the affair, Harrington was taken sick, and vomited profusely. It was too late for the supper at the clubhouse; in fact, most of those waiting there had left. After going to head-quarters, Harrington insisted that nothing should be said about the affair; and the party separated.

Such are the salient points of the Washington Safe Burglary scheme, up to the morning of the 24th of April, 1874. From that moment to this, a wider conspiracy, embracing many more actors, has been in energetic execution, its well-known purpose being to shield the authors and the managers of the original plot.

Every effort was made by Harrington, Williams, and Clarvoe to keep the fact of watching the burglars, and following one of them to Alexander's house, from the public. Harrington

visited the office of the evening newspaper the next day, and revised an account of the safe-blowing, making it appear as an actual robbery, and the arrest as taking place in the immediate vicinity of the office. Hayes left for New York at nine o'clock the same night the plot was put in execution; Zirruth had also disappeared; Whitley and Nettleship were about their usual business; A. B. Williams, under Harrington's permit, had interviews with Benton in jail, to whom he explained the situation.

But Major Richards was not satisfied to let the matter rest, feeling that his official and personal reputation were at stake. The facts fixing the affair as a job in which he was made to play a part forced themselves upon his attention. The work was that of a skilled burglar. Such men do not come into the immediate vicinity of police head-quarters at an early hour in the evening, enter a public office on a frequented avenue, find it occupied, and soon after return boldly knowing they are watched, leave no outside guard, enter and proceed deliberately to break down a door with a loud crash, blow open a safe with a heavy charge of gunpowder, walk out with its contents, and move directly toward the only group of persons near, — the one having the contents of the safe walking over eight squares with the greatest deliberation and in the midst of his pursuers, even turning to ask directions of them, — such things, argued Major Richards, do not occur without a full understanding between the burglars and parties who can protect them. Thus reasoning, he made a detailed report of the things he had done and seen the night before, and filed it with the Board of Metropolitan Police.

The Ring succeeded in keeping Richards's report from the public for a few days, and began to comfort itself that the matter would pass without inquiry or exposure.

The president of this board of police was the proprietor of the chief Ring organ, himself having a secret part in contracts under the Ring; that is, a part which consisted in receiving a good share of the profits, without any investment of time or money.

The next most active member was one whose relations to rings and the lobby appear from the fact that he received \$7,500 of the famous Pacific Mail corruption fund. He was also president of the Washington Club. The other members were easily kept quiet. But suddenly some of the correspondents who were active in the proceedings against the Board of Public Works received

a hint that the reported safe burglary was not such, but only a plot against the memorialists, and that Major Richards had made a report of the facts attending its perpetration. They soon dragged this central feature of the affair to light. On the fourth of May several of them gave publicity to the matter, and charged the plot on the District Ring. The next day the House of Representatives took notice of this grave accusation, and referred the matter of the alleged safe burglary to the joint committee then inquiring into the affairs of the District, with orders to investigate it, and report.

Meanwhile, though the failure to connect Alexander with the burglary in such a way as to secure his arrest was a sore disappointment, both the original purpose and present self-protection seemed to demand the immediate collection of sufficient evidence to justify them in charging the matter upon him, either in case it became public through Richards's report, or if at any time it should still be deemed practicable to make the attempt.

Immediately after the blowing of the safe became known, a detective named George Carter, employed on the Baltimore and Ohio Railroad, went to Madge, the Supervising Special Agent of the Treasury Department, and reported that he had heard Alexander named as one connected with the affair. Madge called on Governor Shepherd, and repeated this; and on Sunday afternoon, the 26th of April, Shepherd sent for Harrington, and went with him to meet Madge at the Arlington Hotel. Harrington then said he had that morning visited Benton in jail, who disclosed the fact that Alexander had employed him. Harrington also said he did not feel warranted in having Alexander arrested until this statement could be corroborated, and he hoped soon to secure the missing link. During the following week Carter came again to Washington, and this time reported to Madge that he made a mistake before, and had now learned that the affair was a job set up on Alexander to disgrace him, and he was going to see Alexander on the subject. Madge went over to the White House, reported this statement of Carter's to General Babcock, and returned to the Treasury. Within twenty minutes Harrington hurriedly entered Madge's office, asked where Carter could be found, said he had seen Babcock, and they wanted Madge to put Carter on the Treasury rolls at once, and they would pay him so that it

should not cost the government any thing. This Madge refused to do, though it was persistently urged upon him.

Harrington then began to telegraph for Nettleship, the despatches being sent by Shailer, a clerk in the Treasury Department, in the Secret Service Division. Shailer had been from the first the means of communication between the operators in Washington and Whitley's force in New York. These telegrams came to be known as the "H." series, from the fact that in them this initial was always used instead of Harrington. On the 1st and 2d of May these telegrams to Nettleship were urgent; but he replied that he was sick. On the evening of the 2d Clarvoe was despatched to Baltimore, to ascertain, if possible, what Carter really knew about the matter, and how he knew it.

On the 4th Shailer again telegraphed Nettleship, that Harrington was very anxious to see him the next morning; but still Nettleship could not come. That next morning Somerville, the New York criminal lawyer before mentioned, arrived, drove at once from his breakfast table to Harrington's house, and asked for an order to see Benton. In two hours and a half Somerville had visited Benton, returned to Harrington and repeated his verbal statement, made an agreement to take it in writing, and, if it was corroborated, have Benton accepted as a witness and discharged on bail, had reduced the long statement to writing, obtained Benton's signature, returned it to Harrington, and at one o'clock was on his way back to New York. Harrington sent a commissioner to the jail to procure Benton's oath to the paper, as Somerville had omitted to have Benton make oath to his statement. This was on the 5th of May. On the 6th Somerville telegraphed Harrington that he would meet him that night "at the Continental;" and though no city was named, Harrington at once took train for Philadelphia, found Somerville and Nettleship there, and also, by accident, Hallett Kilbourn, the manager of the noted real-estate pool of the District Ring. It was not until a year after, during the trial of General Babcock, that the fact came out that Nettleship accompanied Somerville to this meeting. After a brief interview with the last two, Harrington started for Washington, while his two friends returned at once to New York.

On the 7th Albert Cunz of the Secret Service force went to Hayes's house in New York, and sent him to Nettleship, who, in turn, after saying there was great danger of an arrest, asked

Hayes to go to Somerville's house, make an affidavit, implicating Alexander, and leave for Canada. Somerville, upon his arrival, had an affidavit prepared, which Hayes refused to sign unless certain alterations were made. Nettleship then sent Cunz to pay him \$200, when Hayes signed the paper, after an assurance from Somerville that the changes he suggested had been made. Soon after Hayes left for Toronto, reported his arrival there to Nettleship, and sent his address.

A few days later the facts developed before the committee placed Harrington where he dared not allow the release of Benton, rendered the manufactured evidence against Alexander useless, made it perfectly clear that the whole affair was a conspiracy to falsely implicate him, and showed all involved that it would require their utmost skill to save themselves.

The investigation ran through six weeks, the committee sitting to examine the matter at such times as witnesses could be secured. Those connected with the plot perjured themselves without hesitation; but on cross-examination each threw much light on the matter. Harrington was first called. He went over the ground of the anonymous letter; of his theory, that, if his safe was to be robbed, it would be in the interest of the memorialists; and of his determination, if the burglars came, to have them watched. While disclaiming the belief that Alexander was implicated, he still took pains to tell the committee that the man in jail so asserted. He stated his own theories to be: 1. That some of the memorialists wanted papers, but as to Alexander, he thought him too shrewd to engage in such a plan. 2. That Alexander knew this scheme was on foot, and concluded to let it run on, because its successful execution would bring discredit on the District authorities. 3. That thieves, learning Evans's books were demanded, thought to obtain a large sum for them, either from those who wanted them, or by blackmail from Evans and his friends. On cross-examination many suspicious facts were brought out. The duty of finding the escaped burglar had been committed to Clarvoe. Both Harrington and Williams had held interviews with Benton in jail. Harrington had telegraphed to Somerville, Benton's counsel, to come over the day before the examination began, and consulted with him as to the expediency of giving the committee Benton's statement implicating Alexander.

Governor Shepherd's interest in the matter appeared in his

sending for Harrington, and the subsequent Sunday interview after Benton had been visited in jail. Harrington's examination created strong suspicions that he was deeply concerned in the plot. The testimony of Richards minutely detailed all the occurrences connected with the blowing open of the safe, and the subsequent movements of the burglars. He stated unhesitatingly that the whole affair was unmistakably a job; and while he would not swear positively that he thought Harrington knew it and was a party to it, still the impression that this was so, was evidently strong in his mind. He passed all the suspicious circumstances of the case in review, and when he finished there was no doubt in the minds of the committee that the affair was a job designed to implicate falsely the representative of the memorialists. The testimony of Somerville, Clarvoe, and A. B. Williams not only deepened this belief, but created a strong conviction that they were each connected with it. Somerville, in playing his part to secure the release of his client Benton, carried the committee a step in advance, and disclosed Hayes as the man who, under the name of Butler, was introduced by Zirrueth to Demaine, and subsequently brought Benton to Alexander. Somerville produced Hayes's affidavit corroborating Benton's in the implication of Alexander, thus laying the foundation for the use of Benton as a government witness. The disclosure of Hayes's name proved the key to the mystery. Clarvoe was asked if he knew him, and said no; but added, that he had been looking for him, and desired to see the gentleman. Upon being asked why, he said he had heard that Hayes was in connection with a man named Carter, who knew considerable about the affair; and, on being pressed further, said he learned this from Madge, a special agent of the Treasury Department. Here Clarvoe stumbled, for the two names he had given, with that of Hayes, opened the way to abundant knowledge.

The story of Carter is by no means the least sensational portion of the dark history. He was a detective residing in Baltimore, and in the employ of a railroad company. A former detective, named Downs, also resided there, and both had previously been engaged with Hayes in working up the Ku-Klux cases in the South for Whitley. All had been discharged from Whitley's force, and Carter and Hayes considered themselves badly treated. After Hayes had agreed with Whitley to undertake the safe

robbery, he conceived the idea that he might be ill-treated again, and, if it became necessary in case of discovery, be repudiated by Whitley and Nettleship. To guard against this, he went to Baltimore and told his friends, Carter and Downs, in a general way, that a safe was to be "cracked" under the direction of Whitley and Nettleship, in the interest of parties concerned in some investigation, and the crime charged on an innocent person. At Hayes's request, Carter went to Washington to see that he "connected" with Nettleship. Hayes visited his Baltimore friends several times, and both finally decided that he was engaged upon a job the knowledge of which might prove of value to themselves. So they went to Washington "prospecting." There the Sanborn inquiry was in progress before the Committee on Ways and Means; and, securing an introduction to Mr. Dawes and Mr. Foster, of that committee, they stated their conviction that a government safe was to be robbed, impressing these gentlemen so much that they thought it proper to call on the President, and warn him that some plot of the kind was on foot. The idea of Carter and Downs seemed to be, that as Solicitor Banfield was at variance with Secretary Richardson, and both were interested against each other in the results of the Sanborn investigation, possibly Banfield was using the Secret Service men to put up a job on the Secretary. Messrs. Dawes and Foster, though they had two successive appointments with the President, were not received on account of the sudden indisposition of the latter. But for this sickness General Babcock would have learned through the President, that outside parties were watching Hayes and Nettleship, and had clues to their work, in which case the plot doubtless would have been abandoned. Carter and his friend next tried without success to see the President themselves, and then went to Secretary Richardson, who, without hearing their story through, sent them to Madge, the Supervising Special Agent of the Treasury. Carter told Madge that Hayes and Nettleship, of Whitley's force, were planning to blow open a government safe to secure certain papers and destroy certain others. Madge thereupon set a watch on the Solicitor's safe and some others. The day before the burglary Carter reported to Madge that the burglars were coming through from New York that day. The second day after this, Madge, hearing of the affair at Harrington's office, at once concluded it was the operation which Carter had partially



traced. On Saturday after the robbery Carter reported again, this time that Alexander was a party to the affair. This led Madge to repeat the whole story of Carter to Governor Shepherd, and the lively time already described followed at once in the camp of the conspirators.

The interview with General Babcock, and Harrington's appeal to Madge to employ Carter, were not developed before the committee, and did not come out till long afterwards. The rest, however, was made known; and the Ring, thus placed on the defensive, began most desperate measures to save itself. Whitley appeared before the committee, and perjured himself freely; said he had not seen Hayes for a long time, and had held no communication with him. He had discharged Hayes and Carter from his employ for cause, and Carter was on bad terms with Nettleship. This latter testimony was to lay the foundation for a defence, based upon the theory that Hayes and Carter had arranged this job to involve falsely the Secret Service force. This seems to have been concocted by the Ring immediately upon the discovery of Carter's knowledge of the affair, and it was stoutly maintained to the last.

Nettleship also appeared, and swore he had been approached by Hayes in Washington, in April, with the story that he was in a job with Carter, and wanted to borrow money till it was worked up. As to Harrington, he had met him two or three times, but only in connection with some criminal cases.

Dart, who first approached Hayes in New York with the message that Colonel Whitley wanted to see him, swore that he never had dealings of any kind with Hayes. The next effort of the Secret Service force was directed toward inducing Hayes himself to come before the committee and testify, or send an affidavit declaring that none of the force were involved in the safe blowing, but that he had been engaged in it with Carter, and at Carter's request. On the 18th of May Mr. Banfield telegraphed Whitley that the committee was anxious to find Hayes, and directing him to look him up. Whitley replied the same day that he would do his best. The next day he telegraphed Banfield for a warrant or subpoena for Hayes, and the same day despatched Nettleship to see him in Toronto. He was, if possible, to obtain an affidavit from Hayes, exonerating the Secret Service force, and implicating Carter. The plan was to enter a *nolle prosequi* in the case of a man under arrest in New York, on condition that he

should go to Washington, and swear he had seen Zirruth and Carter together, while an ex-officer of the force would swear that Carter tried to induce him to undertake the job. In case Nettleship succeeded with Hayes, he was to telegraph under the name of Mr. Johnson to a detective named Applegate on the force in Boston, where Whitley was to be, "Securities good. Invest." On the receipt of this, Newcomb, Whitley's confidential man on the force, was to visit Hayes at Toronto, and complete the arrangement with him. To Nettleship's surprise, Hayes refused to make the desired affidavit; but the former, evidently thinking it would be better to have Newcomb come and make another effort, sent the telegram, "Securities good. Invest," to Boston. This misled Whitley, who wrote the next morning to Newcomb, in New York, that he had just learned Hayes was in Toronto, directing him to go there, and, if possible, induce Hayes to return to Washington, but if he declined, obtain his affidavit. Newcomb failed, as Nettleship had; but upon his return he appeared before the committee, and swore that, acting under instructions from Colonel Whitley, he had visited Hayes in Canada, and had been assured by him that no one in the Secret Service employ had any thing to do with the safe burglary; that Carter had planned it, and employed Hayes in it. Newcomb's manufactured version of Nettleship's story embraced nearly all the points that had come out in testimony, and represented Hayes as giving the details of the meetings with Zirruth, Demaine, and Alexander. The members of the force were becoming confident. The Carter theory was growing upon the committee. Zirruth was safely out of the way, and there seemed no probability that Hayes would dare to come before the committee. A few days more, and it would adjourn, when there would be time to prepare for future contingencies. But just here those terrible Baltimore friends of Hayes stepped in and brought general dismay. Downs, working under Alexander, undertook to find Hayes, succeeded, and appeared with him quite unexpectedly one morning at the door of the committee-room. Hayes was at once examined, and told his story in full. He was identified by Alexander and Demaine as Butler. To prove that he was in communication with Whitley, he referred to the telegram he had filed the day of his arrival, informing Whitley that he could not find Nettleship. The committee sent to the designated office, and found the despatch. He also mentioned the

despatch he had sent from New York to Nettleship, when he failed to induce the thief Ferry to undertake the job. This also was found. He produced a letter in Nettleship's handwriting over the signature of "Mrs. Shaw," written to him in Toronto just previous to Nettleship's visit; one from Newcomb, advising him of his coming; and an envelope from Albert Cunz, a man on the Secret Service force, in which he had received money from Nettleship. He related his two visits to Harrington's office, at the second of which the burglar inspected the safe. Harrington, upon being confronted with the witness, admitted the truth of the statement, but said the men came to ask about counterfeiting cases. Hayes stated, that on his return from Canada he went to Newark at the suggestion of Cunz, and met Nettleship, who, in the presence of several parties then gathering to attend the funeral of Nettleship's child, paid him money, and, as Hayes swore, urged him to go away again, although this was the very time Whitley and the whole force were pretending to the committee that every effort was being made to find Hayes and bring him to Washington.

Upon being recalled, Whitley swore he was in Boston on the day Hayes pretended to have met him first in New York; that he never received the Hayes telegram of the next day from Washington; and that his purported signature to the receipt-book, which had been brought from New York, was not his own, but that of Albert Cunz, who could imitate it well. Nettleship denied his letter and telegrams to Hayes, and Cunz swore he had never sent him money, and that the envelopes which Hayes exhibited were not addressed in his handwriting. Experts, however, agreed that Whitley's signature, and the telegrams and letters, were what Hayes declared them to be. The unexpected appearance of Hayes with his testimony was a terrible blow, and steps were immediately taken toward counteracting his statements. Shortly after, the telegraph delivery-book disappeared from the committee-room and could not be found. The clerk, one Colby, was suspected of concealing it, and, in fact, the book was last traced to his hands. Until Hayes returned, he was supposed to be the burglar who escaped under the direction of A. B. Williams. But his testimony disclosed the identity of Zirrueth and Bliss, and brought out the leading actors in the conspiracy so clearly, that the committee, after examining telegraph men and experts as to

the existence and genuineness of the documents, and some other persons, chiefly of the Secret Service force, upon certain points developed by Hayes, closed the inquiry, and laid the results of its labors before the House.

Its report was submitted on the 23d of June, and stated, that while the "testimony satisfies your committee that one of the objects of the burglary was to falsely implicate Columbus Alexander, one of the memorialists, still, in the absence of a number of witnesses, and the necessity of fuller investigation, it was improper to express an opinion upon the question, 'Who were the conspirators?'" The committee, therefore, calling special attention to Hayes's telegrams to Whitley and Nettleship, and to the other telegrams and letters in evidence, unanimously reported a resolution directing the clerk of the House to send copies of the evidence taken to the Secretary of the Treasury and the Attorney-General, for their information and guidance. This resolution was adopted by the House; and the further investigation of the case passed into the hands of the two cabinet officers designated. Mr. Richardson had given place to Secretary Bristow, and Mr. Williams was Attorney-General.

The resolution of the House reached these two officials the last week in June. During the first week in July the Secretary of the Treasury had charged Major Bluford Wilson, who had just entered upon his duties as Solicitor of that department in place of Mr. Banfield, to investigate fully the alleged connection of the Secret Service Division with the conspiracy. At the same time Attorney-General Williams commissioned the Hon. Albert G. Riddle, one of the ablest and most prominent lawyers of the Washington bar, as Special Assistant Attorney-General, and directed him to examine the whole case, with the view of securing the indictment and punishment of the guilty parties.

Solicitor Wilson began work in New York, and subjected the records and the operatives of the Secret Service Division to close examination. He also visited Boston to learn the true significance of Nettleship's telegram from Toronto to Applegate, which Hayes claimed related to Nettleship's business with him, and which Nettleship and Applegate insisted pertained to a wholly different matter. Through unlimited falsehood on the part of the members of the force, through false accounts and entries, and by earnest, personal representations as to the honesty of Whitley

from General Babcock, and an ex-secretary of the President, who were personal friends of the Solicitor, and in whom he then had implicit confidence, he was led temporarily to believe that one object of the conspiracy had been falsely to implicate in it the Secret Service force. The Associated Press despatches from New York, and afterwards from Boston, were used to declare that the Solicitor's work had fully exonerated the Division. The similarity of the telegrams from these two points clearly showed them to have a common origin, and it was also apparent that they were prompted by Whitley.

The Ring was in ecstasies at what it deemed the certain prospect of the full vindication of the chief managers of the burglary at the hands of the Secretary of the Treasury.

Meantime, however, Mr. Riddle had made rapid progress before the grand jury; and, in order to render his efforts the more effective, had revived a good practice which had fallen into disuse in Washington, of the prosecuting attorney appearing in the grand-jury room and conducting in person the examination of his witnesses. Upon the return of Solicitor Wilson, he had an interview with Mr. Riddle, in which he ascertained certain facts that had been developed by the latter. The knowledge of these determined him to return at once to New York, and continue his work. In a short time he swept away the whole fabric of deceit with which Whitley, his friends, and his gang, had sought to mislead him, and returned to Secretary Bristow with a report that immediately decided the latter to demand the resignation of Whitley and his assistant, and the removal of nearly the whole force. Every effort was made to shake the new Secretary in his determination. All political influence which Babcock and the District Ring could command was used, as far as they dared exercise it, to change Mr. Bristow's purpose. It was the first time a Secretary had stood immovable and unconcerned before this array. But for a reason which weighed with him as a lawyer, the whole force would have been instantly removed. Their cases were before the grand jury. To remove them, or to accept their resignation pending this inquiry, might unduly prejudice their cases with the jury; and so action was delayed until indictments had been found against them. Then a whole division, and one that deemed itself impregnably intrenched, by virtue of the confidences it possessed and the work it had performed, was virtually thrust

out of the government employ, and its head-quarters removed from New York to the Treasury Department, where, in future, the Secretary could have it under his eye. Such an event had never happened before in the history of the government, and it marked the beginning of that bold, brave work of reform which Mr. Bristow had determined upon.

The failure of the attempts to mislead and deceive Solicitor Wilson, and the energy with which Mr. Riddle pushed the inquiry before the grand jury, were full notice to the Ring that the most desperate efforts on their part would be necessary to save themselves. It will be interesting to look at some of the means adopted.

Hayes had been arrested by Harrington immediately upon leaving the committee-room at the close of his testimony, and he was then in jail. Both Solicitor Wilson and Mr. Riddle had interviews with him, obtained from him much valuable information, and agreed to use him as a government witness, and he was admitted to bail about the commencement of the trial. During the last week in July the grand jury adjourned until the close of August, and Mr. Riddle started on a summer vacation. He had, however, left a proposition with Benton, that if he would tell him the truth, he would use him also as a witness. Benton had become exceedingly restive under the unexpected duration of his imprisonment, and sent word to Harrington, that, unless immediate steps were taken to secure his release, he would accept Mr. Riddle's proposition, and make full confession; whereupon Somerville went on to Washington from New York, and Harrington returned from a point where he was spending a vacation; and although he had two months before, in open court, surrendered the case into the hands of Mr. Riddle, both went to the Maryland residence of Judge Olin, who knew nothing of the case or of Mr. Riddle's connection with it, and without representing to him the gravity of the matter, or the relations which Benton sustained to it, procured an order for admitting the prisoner to bail. Returning to the city, the necessary papers were made out, not in the usual office of the court, but in that very appropriate place, the back office of the District Attorney, where stood the safe which had been sacrificed in the conspiracy.

A person brought from New York for the purpose by Somerville was accepted as Benton's bail, and he was set at liberty.

From that day to this the government has been unable to compass his arrest. The security turned out to be valueless; and, as if in bitter mockery of the Washington authorities, the man who made false oath as to his financial condition, swearing that he was worth twelve thousand dollars, was some time afterwards prosecuted for perjury, and convicted in one of the courts of New York City. Harrington, at the time Benton was admitted to bail, had been relieved of all duty as government prosecutor in connection with this case, and had no authority of any kind over it; yet he assumed to act, and did not even inform Mr. Riddle, or any one representing the interests of the government, of the contemplated movement in Benton's behalf. In addition to this precaution, late Saturday night was the hour chosen for consummating the affair, in order to avoid publicity till Benton should be well out of the way, since the least whispering of the matter would have brought a telegraphic order from Mr. Riddle, or one from the Attorney-General, for his re-arrest.

Mr. Riddle, backed by the entire power of the Department of Justice, and armed with autograph letters from Attorney-General Williams to officers of his department in New York and New Jersey, afterwards exhausted all means to secure the re-arrest of Benton. Through this effort the startling fact became evident that the United States government was absolutely powerless to reach the association of thieves having its head-quarters in New York City. Mr. Riddle was informed that Benton belonged to an association of this kind, and that it would be impossible to secure his arrest and return to Washington. It mattered not what form of process he attempted to use, or through what combination of government officials he attempted to work, he was met everywhere by the fact, that in advance of these officers went messengers charged with warning the man whose arrest was sought.

Upon Mr. Riddle's return he completed his investigation before the grand jury, and indictments were returned against Harrington, Whitley, Nettleship, A. B. Williams, Hayes, Zirrueth, Bliss, and Albert Cunz.

Thus far Nettleship had been able to keep Zirrueth entirely out of sight of the authorities; and arrangements were at length completed for sending him to Europe, under a promise of receiving his passage, a thousand dollars, and a regular payment to his family

while it might be necessary for him to remain abroad. A deputy marshal of the United States, named Bailey, purchased his ticket, and superintended his departure from Jersey City.

In the first stages of his work, Mr. Riddle found he could secure no success through the aid of the Washington detective force, as most of the men composing it seemed to be entirely in the power of the Ring. Downs was therefore employed to look up Zirruth; and he had succeeded in having full interviews with the latter, while the negotiations for his trip to Europe were pending. Downs managed the matter successfully; and Zirruth, having been taken to the steamer in one tug by the marshal, jumped on board another leaving for the shore from the other side of the vessel, returned to Jersey City, waited until the first instalment of \$250 had been paid to his wife, and then went to Washington in company with Downs, arriving in time for the trial.

Every attempt to secure Nettleship, who was openly present at his home in Newark, also proved a failure. He was fully protected by the police-officers of that city, while the District Attorney, and even the United States Commissioner there, acted in full collusion with the police to prevent any arrest which would result in his transfer to Washington. Finally an officer in person made known the difficulties in the case to Mr. Riddle. It appeared that Nettleship was chairman of a prominent local republican committee, and had much to do with the manipulations of the political machine in that section. Through prominent candidates of the republican party, some of whom were planning for congressional honors, and others seeking the governorship of the State, the chief of police of Newark had been prevailed upon to undertake the job of preventing Nettleship's return to Washington.

Attorney-General Williams wrote in person to United States District Attorney Keasby, at Newark, directing him to use his best efforts to aid in the arrest of Nettleship, and his transfer to Washington for trial. Downs was despatched to Newark with a warrant for Nettleship, directed to the United States District Judge of New Jersey, who had agreed to send Nettleship to Washington, and he deputized Downs to serve it. The police authorities thereupon detailed a man to remain constantly in the vicinity of Nettleship; and, in case Downs attempted to serve the warrant, Nettleship was to resist, both were to be arrested and



brought to police head-quarters, where Nettleship was to be discharged. When Downs appeared in Newark, he produced a letter from Attorney-General Williams to Keasby, commanding the latter's assistance. Keasby, upon reading this, excused himself for a few moments, and on his return said they would go to the office of Mr. Whitehead, the United States Commissioner. Arriving there, they found Nettleship in waiting. Downs was therefore obliged to arrest him in this office, and thus Nettleship was enabled to claim the right to give bail before the Commissioner. The latter was an intimate associate of Nettleship's. It had been Downs's intention to take him before the United States District Judge at Trenton, but this movement on the part of Keasby prevented his so doing.

The Commissioner immediately discharged Nettleship on a thousand dollars bail, although Keasby had been informed officially that the court in Washington fixed the bail of various parties concerned in the same transactions at five thousand dollars, and he was expected to require the same amount for Nettleship. The latter forfeited this bail, and did not appear for trial.

It will be remembered that two days before the blowing open of the safe, Harrington, then in Washington, had telegraphed Williams, then in New York, "Come home to-night. Ask 'N.' to come with you. Keep our friends on the lookout for Smith." This was one of the awkward pieces of testimony which it was desirable to destroy. Accordingly Harrington and Williams visited the telegraph office, and requested permission to see the despatches which they had sent during the summer. These, twenty in number, were selected and placed in the office at their disposal for inspection. Upon their departure, a recount of the messages showed this one to be missing. The manager therefore telegraphed to New York, secured a copy, and filed it in place. The original being in Harrington's possession, the way was open for the testimony subsequently offered to prove that "N." in the despatch did not stand for Nettleship, but had been incorrectly transcribed, and was originally written "G.," which they pretended represented a person to whom Williams was to make application for the purpose of securing the witness Kirtland, then wanted by the Committee of Investigation, and designated in this telegram to Williams as Smith. Long after Williams had been on trial and acquitted, it was clearly proved that "N." in

this telegram stood for Nettleship, and that Smith was one of the men first employed by him to help work up the plot.

As the trial drew near the prosecution desired the testimony of Colby, the clerk of the Congressional Committee, under whose manipulation the telegraph receipt-book had disappeared in which was Whitley's signature for the telegram sent by Hayes from Washington on the 7th of April. This book had subsequently been recovered, and the testimony of Colby was wanted as to the suspicious circumstances attending its disappearance. No sooner was this discovered, than Colby received the appointment of United States Consul to Chin Kiang, China, for which point he departed in advance of a *subpœna*. This consular post was as near the opposite side of the earth from Washington as any then available in the interior of the Chinese Empire.

The case came on for trial about the middle of October, 1874, in the Criminal Court of the District of Columbia, Associate Justice D. C. Humphreys presiding. There were in attendance, as the standing jury for the term, twenty-six persons, out of whom the petty jury was to be selected. Upon examining these before the court, eight only were found qualified to sit and were sworn as jurors. The court then directed the marshal to summon twenty-five citizens, from whom the remaining four were to be chosen. Here the most effective work of the Ring for its own protection was accomplished. The marshal was a brother-in-law of the President, and his relations to the leading spirits of the Ring were intimate. For the first time in his official career, he took the matter of summoning persons for the jury-list out of the hands of his assistant, and directed it himself. Of the twenty-five citizens thus summoned, several were intimate friends of Harrington, and excused themselves on this ground; one was an intimate friend of A. B. Williams; one the attorney of a bank having extensive dealings with the Ring; three were members of the Washington Club, holding close relations with the Ring; three were colored men, also closely allied to it; one was the son of the ex-governor of the District, formerly President of the Board of Public Works; two were confidential business associates of the ex-governor; five others were known and pronounced friends of the Ring; and one was a heavy contractor. Fearing that a jury selected even from such material as this would not absolutely insure a disagreement or an acquittal, a case was made up for the

purpose of disputing the legality of the grand jury which had returned the indictments. An attorney in a minor case was induced to set up a plea that the grand jury was illegal, because one of its members was over sixty years of age, and another was not a taxpayer. Upon the arraignment of Harrington, Whitley, and the rest, each entered a plea in abatement, which called in question the legality of the grand jury; and this in face of the fact that Harrington himself, previous to his arrest, and while acting as prosecuting officer of the court, had tried many persons indicted by this same jury, and a number thus tried were then serving sentences in the penitentiary. During the trial, which went on notwithstanding these pleas, Hayes and Ziruth were used as witnesses; and all the main facts thus far stated were brought to light, except such as tended to connect General Babcock with the conspiracy. Up to the time of this trial, and during its continuance, nothing had been elicited which served to involve him in the matter. The affair naturally caused great excitement in Washington; and when the case went to the jury, the memorialists were very careful to have all approaches to the jury-room watched. At one time signalling was discovered between this room and one of the defendants. On another occasion Governor Shepherd himself was found locked with a friend in that part of the building occupied by the jury, and having free access to that portion of it to which the jurymen retired in case of necessity.

The verdict was, acquittal of A. B. Williams, and a disagreement as to all the rest. At a subsequent consultation between the Attorney-General and Mr. Riddle, it was agreed that new indictments should be obtained at the ensuing term of the Criminal Court, at the hands of another grand jury, against which no questions affecting its legality could arise.

The court having just decided that the other indictments were invalid in the test case previously set up by the ring, the Attorney-General directed a *nolle prosequi* to be entered in all the cases, leaving them open to new indictments.

Toward the close of the first trial Whitley had made several propositions to Mr. Riddle to place him in possession of all the facts in the case; and after it was over the subject was further discussed, and arrangements nearly completed for moving in the matter, when Mr. Riddle received a letter from the Attorney-General, not merely suspending the further prosecution of the case, but dismissing him from it.

At the ensuing session of Congress three separate attempts were made in the House of Representatives to secure an investigation of the means used to defeat the prosecution before the District court; but in each case enough republicans were found to vote against it, and to prevent the necessary two-thirds vote. An effort to pass a law authorizing a new grand jury for the District to be drawn at once, was also opposed and delayed by some very prominent republicans; but they were easily forced to withdraw their opposition, through fear of threatened exposure.

Thus the matter rested until the assembling of the forty-fourth Congress, when a new investigation was ordered.

To return to the trial before the District Court. After the indictments had been obtained, Attorney-General Williams assigned the First Assistant Attorney-General, Mr. C. H. Hill, to assist in the prosecution of the case. In this, as in all other steps taken by Mr. Williams, he manifested a purpose to secure a thorough trial of the whole matter. Mr. Hill entered upon the work with the energy, ability, and conscientious attention to duty which had marked his entire career, in the very prominent and responsible position he held in the Department of Justice. His presentation of the case to the jury fully justified his selection.

That part of the investigation carried on at the same time by Solicitor Wilson was rich in results, and furnished some of the most valuable testimony elicited during the trial. His was most courageous work, pushed in the face of secret political and social influences, which high principle and whole-souled devotion to duty alone could have resisted; and the Ring found itself powerless to swerve this young officer by so much as a hair's-breadth.

The general character of the protracted trial can best be indicated by a recital of some of the expedients adopted by the defence; although one devised by the Ring about this time is also worthy of notice.

Just before the court took up the case, a plot was formed to render Hayes unavailable as a government witness. He had been accepted as such, and was on bail. The scheme contemplated connecting him with a gang of counterfeiters, some of whom were to be seen with him in public places on several occasions, when the whole party were to be arrested, including Hayes. With this as a basis, followed by false testimony, it was expected that Hayes could be disposed of. He was sharp enough to penetrate

the design, and sending several friends to the place appointed for the second interview, he denounced those who came to meet him in their presence, and so alarmed them that the plan was abandoned.

The defence was conducted by the Hon. N. B. Smithers, a leading lawyer of Delaware, and Mr. W. D. Davidge, one of the most prominent lawyers of Washington, for Harrington and Williams, and by Mr. S. S. Henkle for Whitley. Mr. Harrington made the closing argument in his own behalf. To discredit the testimony of Hayes touching the interview with Whitley at the head-quarters in New York on the 6th of April, when Hayes claimed he was engaged to come to Washington and report for duty to Nettleship, Whitley swore out a warrant, and had him arrested for perjury at the close of his testimony, and while the case was before the jury. The affidavit was drawn by Judge Fisher, the nominal district attorney. Hayes was promptly discharged by the Criminal Court, on the ground that it was an unwarranted and flagitious attempt to influence the trial then in progress. The defence also set up an *alibi*; proved that Whitley gave a dinner-party at Cambridgeport, near Boston, on the 5th of April, and attempted to show, by several who thought they had seen him, that he was in Boston on the morning of the 6th. This vital part of the *alibi* failed, the prosecution producing two telegrams dated the 6th, one from Solicitor Banfield in Washington to Whitley in New York, directing him to report in Washington, and a reply from New York by Whitley the same day, saying he was not well, and that he would start the next day. To prop up the tumbling structure, Newcomb testified that he sent this despatch to deceive Mr. Banfield as to Whitley's whereabouts, and both Newcomb and Applegate swore they were at the New York office all day on the 6th, and neither saw Whitley, and that both went up to the Boston depot that night to welcome him home. Dart, however, who, Hayes swore, came to his house on the morning of the 6th, telling him Whitley wanted to see him at the office, though sworn, was not called and asked about this feature of the affair, for the good reason that several witnesses were present to testify that they saw him at Hayes's house on that morning.

As to Hayes's telegram from Washington to Whitley the next forenoon informing the chief that Nettleship could not be found, the defence attempted to prove that Whitley did not write the

receipt, though competent experts pronounced the handwriting his, but that it was written by Albert Cunz, a clerk of Whitley, who, though indicted with his chief and the rest, managed to avoid appearing through delay caused by a writ of *habeas corpus* taken out in his case in New York. The defence, however, did not prove that Whitley failed to receive this telegram, which was admitted to have reached the hands of his clerk. The prosecution had a witness who went with Hayes to see Nettleship when the latter sent him to Somerville to sign the affidavit, and who also accompanied Hayes to Somerville's house. So in regard to this part of the case the defence contented itself with resisting the introduction of the affidavit which Hayes had signed.

It became necessary to show, if possible, that Whitley did not know that Hayes was in Toronto at the time the former was ordered by Mr. Banfield to find him for the committee. This involved proving that Nettleship, who had gone to induce Hayes to make upon the arrival of Newcomb an affidavit exonerating the Secret Service and implicating Carter, was in Toronto on other business, and that although Hayes had produced the telegram in Nettleship's handwriting to Applegate in Boston, it did not relate in any way to dealings with himself. This telegram read, "Securities good. Invest," and was signed "M. Johnson." It was to notify Whitley that Hayes would make the required affidavit if Newcomb came on. To explain this, Applegate swore that he and Nettleship were seeking to obtain a reward in a case of which Whitley knew nothing. A criminal in Boston named Milledge Johnson, had "jumped bail" and was in Canada, and his sureties had offered a reward. Nettleship on his way West was to stop in Toronto, and see if the man could be found. Applegate was to visit Boston, and ascertain whether the sureties were good, and, if so, advise Nettleship to invest. This was Applegate's statement; but he was stupid and frightened, and broke down completely on cross-examination. Nettleship had telegraphed from Canada to Boston what Applegate, according to his own explanation, had agreed to telegraph from Boston to Nettleship. He had visited Boston, where the sureties lived, to ascertain whether they were good, and report to Nettleship in Canada; but, instead of this, Nettleship telegraphed Applegate from Canada, where none of the sureties resided and where they were not known, that they were good.

Next it became necessary to show how Whitley ascertained that Hayes was in Toronto, so that he could send Newcomb to see him. Whitley therefore asserted that he had received a drop-letter, and Applegate declared he had seen Whitley take it out of the waste-basket and save it. Here he failed again; for, after he had sworn to the date of finding this letter, it was necessary to believe that this basket, which received all the waste paper of the office, had not been full enough to empty in two months.

As to Harrington, the defence set up that the conspiracy was aimed at Whitley and Nettleship by Carter and Hayes, because of their discharge by Whitley, and the subsequent ill-treatment of Carter by Nettleship. Newcomb's version of his interview with Hayes at Toronto was used to sustain this theory. And in support of Newcomb, one Bauer, also of Whitley's force, swore that Hayes, on appearing in New York from Canada, repeated the story of Carter's duplicity to him. An ex-detective of the force, named Reed, also testified that Hayes had asked him to take part in such a job.

It was next maintained that Hayes conceived the idea of involving Harrington for revenge, after the latter had caused his arrest as he came from the committee-room. Harrington's other theory was also broached; namely, that it was a plan of thieves to secure Evans's books, and then obtain money, either by their return, or by selling them to Alexander. Still another set forth that Hayes and Carter conspired to falsely implicate Alexander, and afterwards levy blackmail upon him as the price of silence regarding Hayes's first interview with him. Mr. Hill punctured this thoroughly, by asking how it happened that these men, strangers in the city, after finding Alexander wanted the Evans books, thought of looking for them in Harrington's safe, where they had never been till the very afternoon preceding the burglary.

When the defence attempted to discredit Zirruth, the prosecution called attention to the fact that Guild, Nettleship's lawyer, who, Zirruth claimed, had paid him money to keep away, had not been called as a witness, and also that the same inattention had occurred in the case of one Corry, who, Zirruth swore, had paid him one thousand dollars to go to Europe, obtained a ticket for him from United States Deputy-Marshall Bailey, and escorted him to the steamer. Instead of bringing Corry himself to impeach Zirruth in these most material points, it appeared that he had

been engaged in hunting up witnesses to contradict Zirruth in other matters, and also to impeach his veracity as a witness.

Concerning the "H." telegrams, which Shailer, acting for Harrington, had sent to Nettleship, it was claimed they were upon business which the force was doing for General Howard; but as the most awkward one of all represented General Howard at work with detectives on Sunday, when, as everybody in Washington knew, he was always engaged in very different work, the explanation had little force. General Howard, at the time of the trial, was on the Pacific coast; and the theory was a safe one. Long afterwards, when he was reached, it appeared that, although about this time he had some dealings with the Division, the telegrams in which the letter "H." was used, and upon which the prosecution relied, had no relation whatever to his case. In fact, it was proved by the prosecution that they bore date before his business was undertaken. Meantime Shailer had been dismissed from the Treasury for most disreputable conduct, and it was easy to obtain him as a witness to swear that Solicitor Wilson dismissed him because he would not agree to say that "H." in his telegrams stood for Harrington.

In the midst of the trial one of those remarkable incidents happened which so often have placed the friends of General Grant's administration sorely on the defensive. Harrington was invited from the prisoner's dock, where he was on trial for a black offence against society, to a card reception at the White House. The foreign ministers present were thunderstruck, and the trial had made such noise in the town, that no one failed to notice Harrington's presence. It was purposely made most conspicuous by the Ring, and the next morning care was taken that the jury should hear all about the President's faith in Harrington. The excuse given for the President was, that Babcock had sent the card without his knowledge.

Throughout the trial the situation of affairs about the office of Judge Fisher, United States Attorney for the District, was a standing scandal. It was the head-quarters of the defence. Here the defendants and their friends gathered to consult before each day's session of the court, and here they reassembled upon adjournment. The disreputable witnesses who were brought from New York by the Secret Service, those whom Somerville deemed useful in the common cause, crowded here daily, together with



the prominent officials, contractors, and operators of the District Ring, under the very eyes of the Department of Justice and of Congress.

After A. B. Williams, on the night of the burglary, followed Bliss the burglar a few steps, then lost or left him, and hastened to intercept Benton on his way to Alexander's, no trace was discovered of Bliss till about two weeks after, when the trains were no longer watched. Then, as was proved on the trial, one dark rainy night Williams drove in a close carriage to one of the trains for New York, and stopped on the other side of the street from the entrance to the depot. Williams came over to ask the time, and walked about so uneasily as to attract the attention of an officer. When the gong sounded for the train to start, a man, who, by the testimony of this officer, a railroad employé, and a third person, fully answered the description of Bliss, jumped out of Williams's carriage, hastily crossed the street, rushed through the depot, and caught the train as it was moving off. To meet this, the defence produced a man who had close relations with Williams's friends to swear that Williams took him to the depot that night. But he admitted that he had no reason for leaving the city hurriedly; and he failed to explain why, when it was raining hard, they stopped on the other side of the street; and when the policeman, the railroad hand, and one other witness who saw the occupant of Williams's carriage that night, were called, they agreed that the witness bore no resemblance in size or general appearance to the friend whom Williams had escorted to the train. The defence did not account for the stolen telegram which showed Williams's communication with Nettleship in New York, nor was any explanation offered why Williams, who alone followed Bliss that night, lost sight of him before he reached the next corner, although it was as easy to track him as it proved to be to follow Benton.

After the case for the defence was in, there came a play of bluff. So great was the confidence which this side had in its jury, and in the effect of the mass of perjured testimony upon it, that a proposition was made to the government, in a manner befitting such an offer, to submit the case without argument. The remarks which accompanied this were so evidently designed for effect, that the judge administered a pointed rebuke, and ordered the case to proceed. Here, it should be said, that notwithstand-

ing the unfaithfulness of several officers of the court, and the aid which they constantly gave the defence in the various stages of this cause, the members of the court itself performed their duty throughout without fear or favor.

One of the most impressive episodes of the trial was the argument of Harrington in his own defence. His circumstances, his popularity, and his considerable oratorical powers all operated to bring together a great audience, and he spoke in the presence of nearly the whole bar of the District. The argument contained few new points, and only aroused interest because he was making it; still his appeals were eloquent, and their solemn character made them effective. Speaking of the blight which the charges brought upon him, and their falsity, he said:—

"I seemed to stand almost alone in the dreary forest-land of my life, while under chilling doubts and suspicions my hopes seemed to flutter, leaf by leaf, silently to the earth, and all around me, stark and bare, stood the ghosts of my ambitions; but out of the distance, away from the gaze of men, came the wondrous and beautiful words that he who gave me life loved so much to hear:—

" ' God moves in a mysterious way,  
His wonders to perform:  
He plants his footsteps in the sea,  
And rides upon the storm.  
His purposes will ripen fast,  
Unfolding every hour;  
The bud may have a bitter taste,  
But sweet will be the flower.'

Then I knew the chilling fingers of doubt would be taken from me; that my heart might bound and my pulse might leap with hopes to be realized, and ambitions to be fulfilled; that, led by the hand of Him who doeth all things well, I should still have purposes to be accomplished and aims to be realized. I shall not fail. To my friends whose faith has been taxed, to my enemies who hoped herein to see me fall, I say I shall *not* fail. In this court-room, where I have won some success, I shall pursue the profession I love, erect and manly, as I have heretofore been in the full stature that God gave me, turning aside for no man's opinion, following the path of duty, as he gives me to see that duty, and by a pure life wipe out even the shadow of your case. I shall not fail. . . . And as, gentlemen of the jury, I leave you this case, I leave with you more than the personal matters which may come to me, I leave to you more than my life,—I leave to you my reputation; and I say to you, I say to this court, I say to the world, that during the whole of these proceedings I have not sullied the personal

dignity of my character, nor tarnished my professional reputation, so help me God."

Mr. Riddle's closing argument occupied three days. It reviewed the case from the first, passing every feature of it before the minds of the jury with great clearness. It pointed out how completely the testimony of Hayes and Zirruth had been corroborated, and emphasized the admission of guilt involved in the various attempts of the actors to destroy testimony and secrete witnesses. Perhaps no case presenting so wide a field, and involving such a variety of facts, complicated by rarely surpassed inventive villany, was ever more thoroughly mastered. As a forensic effort, it was singularly unambitious; in the language of the advocate, "beginning without exordium and ending without peroration."

But no keenness of analysis, no force of presentation, no power of logic, no demonstration of guilt, could have secured conviction at the hands of a jury so shamelessly packed. It was not through any lack of the positive proofs of guilt, nor any want of legal skill on the part of the prosecution in presenting them, that the Ring escaped; but its triumph came through the simple matters of perjury and jury-packing.

Only Williams, the least prominent partner in the conspiracy, had been acquitted. The rest, though temporarily safe, were still amenable to a second trial. As soon as Mr. Riddle's purpose to secure new indictments became known to the Ring, its desperate efforts at self-defence were renewed. By means as yet unknown, the Attorney-General, who thus far had shown only a purpose to push the case energetically, was induced, as has been already stated, to terminate Mr. Riddle's connection with it; and for the time all steps looking to a new trial were abandoned. Efforts were at once begun to compass the removal of Mr. Hill and Solicitor Wilson. Of course the Ring did not approach the President and ask these removals because of the energy with which they had discharged their duties in the late trial; but, by ways in which they were skilled, they poisoned him against these faithful officers, and he finally asked the Attorney-General for the resignation of Mr. Hill, and the Secretary of the Treasury for that of Solicitor Wilson. Mr. Williams yielded, and communicated the wish of the President to Mr. Hill, assuring him, however, that he had the full confidence of the Attorney-General,

and that no objection could lie against him for any want of ability, efficiency, or faithfulness.

Mr. Bristow was less easily moved. He said plainly to the President that he regarded the opposition to Solicitor Wilson as springing solely from those who objected to the fidelity with which he had discharged his duties in connection with the safe burglary investigation, and, as Major Wilson was acting under his orders as Secretary, he did not propose to desert him; and, therefore, if the President, upon reflection, should decide to insist upon Wilson's resignation, he should be obliged to ask the President to accept his own as Secretary.

Thus the public lost the services of Mr. Hill by the dictation of a powerful Ring of corruptionists, and thus Solicitor Wilson was saved in defiance of the same Ring, to accomplish still greater results in the famous war of Secretary Bristow on the whiskey thieves.

The Ring, though thankful for present relief, and the prospect of a considerable season of quiet in which to perfect plans to insure final escape, was sorely disappointed at the result of the trial. When such a jury as had been obtained could not be persuaded to acquit, the prospect began to look discouraging. At the following short session of Congress, as has been stated, the Ring was able to defeat every attempt to secure further investigation.

During the long recess which preceded the assembling of the forty-fourth Congress, but one threatening event occurred. A dry-goods store in the city was robbed of several thousand dollars' worth of silk by some thieves from Baltimore. After the arrest of one of them named Snyder, he informed Harrington that he knew too much about the safe burglary to be kept there long. Harrington sent "Billy" Evans to the thief; and the former soon made arrangements to have him released on spurious bail. Charles Fisher, a son of the District Attorney and an assistant in his father's office, with Evans, dressed up a man named Green, from Baltimore, to personate a wealthy citizen of Georgetown, named Edes. This man was accepted as surety for Snyder; and the latter was released on \$3,000 bail. Fisher, Evans, and a clerk of the police court were subsequently indicted in connection with this case. Green was arrested, but failed of conviction through a disagreement of the jury obtained by false testimony as to his iden-

tity. When the forty-fourth Congress met, the House promptly passed a resolution of inquiry. Nettleship, who had become tired of the position which he occupied as a fugitive from justice, made overtures both to the committee and the District Attorney to appear and testify fully if the government would use him as a witness. The knowledge of this offer brought Whitley from Colorado to save himself. He had been keeping out of the reach of the District authorities at the instance of leading members of the Ring, and the latter were displeased and disturbed at his return. He sought immunity both at the hands of the District Attorney and the Attorney-General, but without success. He then offered to tell the committee all he knew in case they would procure immunity for him from the Attorney-General. To this the committee agreed; and Mr. Pierrepont gave him the required protection, conditioned upon his satisfying the committee that he told the truth.

The Ring plainly saw that when these two prominent actors in the plot should tell their story, the new District Attorney would be obliged to put the whole matter before the grand jury. In fact, the moment the democratic house began to investigate in earnest, it seemed safest for the Ring to have a new trial while their hold upon the political machinery of the District lasted. Before another Congress met, there would be a change of administration. So it was decided to brave the thing through. The chances of running the rapids safely were at least considerably in their favor, and the long journey had been a desperate one in all its stages from the moment Harrington turned unsuccessful from Alexander's door.

Nettleship and Whitley appeared before the Judiciary Committee, and confessed the details of the conspiracy. Among the few new facts brought out was a statement of such disbursements of the Ring as had come to the knowledge of Nettleship. These had been for paying Bliss, Benton, Somerville, and other operators, keeping witnesses out of the way, and discharging the expenses incurred in procuring attorneys and witnesses for the first trial. So far as Nettleship could account for these various disbursements, they exceeded twenty-two thousand dollars.

Babcock was called, and swore, that, in the interviews described by Whitley, he had only employed him to engage men to watch certain Washington correspondents, who, he claimed, were publishing false charges against him, and see who furnished them

with their information about the Ring, and try to arrange some plan for thwarting their efforts and rendering them powerless.

When the case was next taken before the grand jury in April, 1876, Babcock, Harrington, Whitley, Nettleship, Somerville, Bliss, and Benton were indicted. When the court opened in June, Harrington fled, Bliss had entered upon a term of fourteen years' imprisonment in state-prison in Vermont, for complicity in a bank burglary, and Benton was still at large. Babcock and Somerville were arrested and gave bail; and the case, instead of being called for trial, was postponed till the middle of September, when Congress would be away, and the attention of the country would be turned from Washington and fixed upon the presidential campaign. Another advantage gained arose from the fact that the jury out of which the panel to try the case would be taken was summoned to court in June, and so became known to the Ring; and such members as could be approached were open to persuasion until the middle of September. The case was to be prepared for trial by the new District Attorney, who could not be expected to understand it very well, however anxious he might be to try it thoroughly.

The Ring did not fail to see that general criticism would be evoked by not again employing Mr. Riddle, who was the only available prosecutor in Washington having a complete inside knowledge of the case, as Mr. Hill and Solicitor Wilson had been forced out of the public service for handling distinguished scoundrels too inconsiderately. But the Ring was equal to dealing with this dilemma. When the case was prepared for trial, and on the afternoon of the day before it was to be called, Mr. Riddle was invited to assist and agreed to do so, as he could not decline without seeming to have voluntarily abandoned a prosecution in which he had been so prominent. The knowledge he had of the case was the property of the public, and he could not allow any personal consideration to prevent its being made available.

That the same delicate care bestowed upon the composition of the jury for the first trial had been exercised anew, was made apparent by the appearance in the jury-box of the steward of the Washington Club House, who prepared the lunch for Harrington and those prominent worthies of the Ring, who so long before had arranged with him to celebrate the arrest of Alexander, and the downfall of the memorialists.

Babcock's defence was conducted by Judge Fullerton, of New York. Somerville's appearance in the trial excited little attention, except from the fact that the President's private secretary and such a man were co-defendants in a criminal case. Whitley and Nettleship were accepted as witnesses, and a *nolle prosequi* entered for each. The defence introduced witnesses to character, and a few to conversations with Whitley tending to prove that General Babcock was not involved in the conspiracy. But the chief reliance of the defence was, after all, upon the main government witnesses, Whitley and Nettleship. While these had agreed before the committee regarding Babcock's guilt, Nettleship swore at the trial that Whitley always claimed to him that Babcock knew nothing of the matter, and Whitley broke down badly, doubtless with purpose, upon cross-examination. In fact, so suspicious was the course of each upon the stand, as to cause a general belief that the whole affair was a shrewdly managed game, in which the first move had been to procure immunity for Whitley and Nettleship, and then, by pre-arranged admissions and contradictions on their part, to insure the escape of Babcock. The various contradictory stories these witnesses had related under oath before both committees of Congress, and upon the previous trial, were used with great power to discredit them with the jury. The theory that Babcock originally sent for Whitley to do quite another thing was skilfully presented, and supported by Whitley's admission, on cross-examination, that Babcock never spoke the words "safe burglary" to him, and that they never conversed about the plot in any open and direct way.

Though Mr. Riddle had, by design, been called into the case at an hour which made it impossible to study its new features fully, still his argument, though destined to fail before this petty jury, carried conviction to the public, — that jury of last resort in such a case. Only a few of its main points can briefly be summarized here: —

There was abundant motive for the crime in the great peril of the Board of Public Works, as vast sums of money, the very existence of the District government, and the reputation of its members, were involved in the attack of the memorialists.

Whitley did not live in the District. He was a stranger to both sides and to Harrington. It was absurd to suppose he would conspire with Harrington, except to please superiors. Of those

against whom charges had been preferred to the committee, he knew Babcock alone.

It needed a man in high position to command the brains and the energy of a powerful division of the government service for such nefarious work.

It was not denied by the defence that Babcock had Whitley ordered to Washington, and sent him at once to Harrington, as the manager of the work he had in mind. It had been argued that Babcock had only legitimate work in view, and that he should not be held responsible if Whitley and Harrington, without his knowledge, set about a plot of which he knew nothing. But no evidence was offered to show that either of these men did any thing else for Babcock, attempted any thing else, or that Babcock called them to account for neglecting his business.

The evidence of Madge had been passed over in silence by the defence. There was no attempt to deny that Madge reported to General Babcock at the White House that Carter had just called at the Treasury, and declared the whole affair a job set up on Alexander. There was no effort to deny that in less than half an hour afterwards Harrington came running in upon Madge, saying he had seen Babcock, asking after Carter, and telling Madge they were exceedingly anxious that he should give Carter employment at once, and that they would see that it cost the government nothing.

The case was one where Congress was investigating the conduct of an officer who had immediately called the whole Secret Service Division of the government to aid in his defence. When the plot failed, Babcock, who knew the actors in it better than any one else, instead of denouncing the crime, and moving to secure the punishment of its perpetrators, contented himself with telling Whitley he thought that Harrington and he were too smart to manage so badly.

Mr. Riddle claimed the corroboration of Whitley to be complete. The flight of Harrington was proof that he dared not face the testimony of his main accomplices. The defence itself relied more strongly than upon any other evidence, on Whitley's declaration that Babcock at no time mentioned the safe burglary in terms, yet in all that did not suit their purpose they denounced him as utterly unworthy of belief.

In spite of Mr. Riddle's convincing argument, a verdict of ac-



quittal for Babcock and Somerville was rendered by the jury, after less than an hour's consultation.

Of the known conspirators, Harrington and Benton alone remain untried. There is still a hope, that through the confession or the trial of the former, some of the prominent actors in the plot, never yet arraigned, may at least be discovered, even if they are not brought to punishment.

This recital of known facts has consumed so much space, as to exclude comment. But this seems wholly unnecessary to those who will recall the persons and positions of the known and suspected actors in the conspiracy, and the place, time, and presence in which it was executed.

H. V. BOYNTON.

## THE RIGHT OF EXPATRIATION.

CAN a citizen of the United States absolve himself from his allegiance thereto, without some law of the United States permitting him so to do?

At the outbreak of the Revolution, the colonists were British subjects, to whom the doctrine of allegiance as laid down by Blackstone<sup>1</sup> applied:—

“Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject.”

“An Englishman who removes to France, or to China, owes the same allegiance to the King of England there as at home, and twenty years hence as well as now. For it is a principle of universal law, that the natural-born subject of one prince cannot, by any act of his own,—no, not by swearing allegiance to another,—put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be divested without the concurrent act of that prince to whom it was first due.”

What act upon the part of the sovereign, co-operating with a desire upon the part of the subject, would work an absolution of the latter from his allegiance to the former, the commentator does not inform us; but the Revolution of 1688 supplies that hiatus. The doctrine was then incorporated into English law, that government is a compact between ruler and ruled, and that when the sovereign departs from his side of the bargain, the subject is released from his. “For, in a full assembly of the Lords and Commons, met in convention, both Houses (Feb. 7, 1688) came to this resolution: ‘That King James the Second, having endeavored to subvert the Constitution of the kingdom, by breaking the original contract between king and people, and, by the advice of Jesuits and other wicked persons, having violated the fundamental laws, and having withdrawn himself out of this kingdom, has *abdicated* the government, and that the throne is thereby vacant.’”<sup>2</sup> Hallam’s comment is: “The convention

<sup>1</sup> 1 Com. 367 *et seq.*

<sup>2</sup> 1 Bla. Com. 212.

pronounced, under the slight disguise of a word unusual in the language of English law, that the actual sovereign had forfeited his right to the nation's allegiance ; " <sup>1</sup> and it is to be noted that this was the precise view of Lord Somers in sustaining the word "abdicated," on behalf of the Commons, as against the word "deserted," which the Lords proposed in lieu : "By avowing to govern according to a despotic power unknown to the Constitution, and inconsistent therewith, he hath renounced to be a king according to the law, — such a king as he swore to be at the coronation, — such a king to whom the allegiance of an English subject is due ; and hath set up another kind of dominion, which is to all intents an *abdication*, or abandoning, of his legal title, as fully as if it had been done by express words."

The doctrine of allegiance, then, as in vogue at the outbreak of the American Revolution, was, first, that the subject owed an allegiance to his sovereign, from which no act of his own could absolve him ; and, secondly, that the sovereign might, by a gross infraction of the original contract between king and people, "forefault" — as the Scotch convention of 1688 put it <sup>2</sup> — the allegiance of the subject.

It is upon this ground that the separation of the Colonies from the parent State is justified in the Declaration of Independence. "He" — say the colonists, referring to their sovereign — "has abdicated government here by declaring us out of his protection, and waging war against us ;" therefore we "are absolved from all allegiance to the British crown." The reference here is to the act of Parliament of Dec. 21, 1775, which declared the colonists to be in a state of rebellion, put them upon the footing of enemies, and authorized hostilities against them by land and sea. Dr. Ramsay, the contemporary historian of the Revolution, says of this statute, "It was considered, from New Hampshire to Georgia, as a *legal* discharge from allegiance to their native sovereign ;" <sup>3</sup> and again : "Though new weight was daily thrown into the scale in which the advantages of independence were weighed, yet it did not preponderate till about that time in 1776 when intelligence reached the colonists of the act of Parliament passed in December, 1775, for throwing them out of British protection. It was said 'that protection and allegiance were reciprocal, and that the refusal of the first was a legal ground for

<sup>1</sup> 3 Const. Hist. 125.

<sup>2</sup> Tyndal, 71.

<sup>3</sup> 2 Hist. U. S. 102.

withholding the last.' They considered themselves to be thereby discharged from their allegiance, and that to declare themselves independent was no more than to announce to the world the real political state in which Great Britain had placed them. This act proved that the colonists might constitutionally declare themselves independent."<sup>1</sup> To the same effect are a number of the early laws and constitutions of the States. In May, 1776, the Rhode Island Assembly passed "An Act for repealing an act entitled 'An Act for the more effectually securing to His Majesty the allegiance of his subjects in this his colony and dominions of Rhode Island and Providence Plantations,' and altering the forms of commissions, of all writs and processes in the courts, and of the oaths prescribed by law," which has this preamble: —

"Whereas, in all States existing by compact, protection and allegiance are reciprocal, the latter being due only in consequence of the former; and whereas, George the Third, King of Great Britain, forgetting his dignity, regardless of the compact most solemnly entered into, ratified, and confirmed to this Colony by his illustrious ancestors, and till of late recognized by him, and entirely departing from the duties and character of a good king, instead of protecting, is endeavoring to destroy, the good people of this Colony, and of all the United Colonies, by sending fleets and armies to America, to confiscate our property, and spread fire, sword, and desolation throughout our country, in order to compel us to submit to the most debasing and detestable tyranny, whereby we are obliged by necessity, and it becomes our highest duty, to use every means with which God and nature have furnished us in support of our invaluable rights and privileges, to oppose that power, which is exerted only for our destruction."<sup>2</sup>

The New Jersey Constitution of July 2, 1776, has this preamble: —

"Whereas, all the constitutional authority ever possessed by the kings of Great Britain over these Colonies or their other dominions was by compact derived from the people, and held of them for the common interest of the whole society, allegiance and protection are, in the nature of things, reciprocal ties, each equally depending upon the other, and liable to be dissolved by the other's being refused or withdrawn: and whereas, George, the Third, King of Great Britain, has refused protection to the good people of these Colonies; and, by assenting to sundry acts of the British Parliament, attempted to subject them to the absolute dominion of that body;

<sup>1</sup> 2 Hist. U. S. 153.

<sup>2</sup> Rhode Island in the Continental Congress, &c. (Providence, 1870), p. 66.

and has also made war upon them in the most cruel and unnatural manner, for no other cause than asserting their just rights, — all civil authority under him is necessarily at an end, and a dissolution of government in each Colony has consequently taken place.”<sup>1</sup>

<sup>1</sup> The Pennsylvania Constitution of Sept. 28, 1776, has this preamble: “Whereas, the inhabitants of this Commonwealth have, in consideration of protection only, heretofore acknowledged allegiance to the King of Great Britain; and the said king has not only withdrawn that protection, but commenced, and still continues to carry on with unabated vengeance, a most cruel and unjust war against them, employing not only the troops of Great Britain, but foreign mercenaries, savages, and slaves, for the avowed purpose of reducing them to a total and abject submission to the despotic domination of the British Parliament, with many other acts of tyranny (more fully set forth in the Declaration of Congress), whereby all allegiance and fealty to the said king and his successors are dissolved, and all power and authority derived from him ceased in these Colonies.”

The North Carolina Constitution of Dec. 18, 1776, has an analogous preamble, thus:—

“Whereas, allegiance and protection are, in their nature, reciprocal, and the one should of right be refused when the other is withdrawn; and whereas, George the Third, king of Great Britain, and late sovereign of the British American Colonies, hath not only withdrawn from them his protection, but, by an act of the British Legislature, declared the inhabitants of these States out of the protection of the British crown, and all their property found upon the high seas liable to be seized and confiscated to the uses mentioned in the said act; and the said George the Third has also sent fleets and armies to prosecute a cruel war against them, for the purpose of reducing the inhabitants of the said Colonies to a state of abject slavery: in consequence whereof, all government under the said king, within the said Colonies, hath ceased, and a total dissolution of government in many of them hath taken place.”

An act of the Massachusetts Legislature, passed in 1777, “for prescribing and establishing an oath of fidelity and allegiance,” opens with a preamble expressive of the same idea:—

“Whereas, the King of Great Britain hath abdicated the government of this and the other United States of America, by putting them out of his protection, and unjustly levying war against them.” *Ancient Charters and Laws of Massachusetts, Bay* (Boston, 1814), p. 700.

An act of the General Assembly of Georgia, of March 1, 1778, is to like effect, though making the absolving act of the British sovereign date at Lexington, saying in its preamble:—

“Whereas, the King of Great Britain did, on the nineteenth day of April, which was in the year of our Lord one thousand seven hundred and seventy-five, commence a cruel and unjust war against the good people of America, with intent to reduce them under subjection to a state of lawless sway and absolute despotism, in violation of the ancient constitution, and utterly subversive of the same; and whereas, the said king, in order to carry the said flagitious and destructive system of government into full effect, did send a body of his troops, on the aforesaid day and year, which troops did wantonly attack and murder the peaceable inhabitants of America, whereby the said king did forfeit and forefault every right and title to the allegiance of the said people.” *Marb. & Crawford*. Dig. 62.

The Vermont Constitution of Dec. 25, 1777, under which that State was admitted

There is likewise extant a charge of Chief Justice Drayton, of South Carolina, in April, 1776, wherein the grand jury are instructed as to the law of allegiance as it then stood. After learnedly going over the proceedings had and the law as settled in the matter of the abdication of James II., and arguing that the case of George III. was parallel, the Chief Justice proceeds: "And thus, as I have, upon the foot of the best authorities, made it evident that George III., king of Great Britain, has endeavored to subvert the constitution of this country, by breaking the original contract between king and people; by the advice of wicked persons has violated the fundamental laws; and has withdrawn himself, by withdrawing the constitutional benefits of the kingly office and his protection out of this country: from such a result of injuries, from such a conjuncture of circumstances, the law of the land authorizes me to declare, and it is my duty boldly to declare, the law, — that George III., king of Great Britain, has abdicated the government, and that the throne is thereby vacant; that is, *he has no authority over us, and we owe no obedience to him.*"<sup>1</sup>

From all this it appears that the colonists justified their separation from the crown upon the law as it then stood, and were particular to have it known that the sovereign had absolved his subjects from their allegiance, and not that the subjects had absolved themselves.

Upon the Declaration of Independence, the States, in right of the sovereignty thereby assumed, demanded from their inhabitants the allegiance theretofore rendered to the Crown. The

in 1791, has a preamble *in totidem verbis* with that of the first constitution of Pennsylvania, *ut sup.*, reciting that George the Third has not only withdrawn his protection from, but levied war against, the colonists, "whereby all allegiance and fealty to the said king and his successors are dissolved and at an end."

Connecticut framed no State constitution proper upon the assumption of independence continuing under the royal charter, *mutatis mutandis*; but in the "Account of the Constitution of Connecticut," published by order of the Continental Congress of Dec. 29, 1780, we read: "There used to be one king's attorney in each county; but since the king has abdicated the government, they are now attorneys to the Governor and Company."

By resolutions of May 31, 1776, the New York Congress set out, as among the reasons why a convention should be had to frame a constitution for that State, "the dissolution of the former government, by the abdication of the late governor, and the exclusion of this Colony from the protection of the King of Great Britain." Debs. N. Y. Conv. 1821, App. 691.

<sup>1</sup> 1 Pitk. Hist. U. S. 491.

Georgia act of 1778, above cited, after setting out that, by his use of military force against the colonists at Lexington, on the 19th of April, 1775, the king had made a breach "in the original contract which subsisted between him and the people," "whereby the said king did forfeit and forefault every right and title to the allegiance of said people," proceeds to say: "It is both just and constitutional that all and every allegiance and other duty which was due from the good people of America on the said day should be immediately transferred, and accordingly were, by means of the said breach, transferred, from the said king to the powers which assumed the rights and exercise of government in this State;" and the idea of this statute may be said to have generally prevailed. Strictly speaking, some of the States afforded those dwelling within their borders on the 4th of July, 1776, a reasonable time wherein to choose whether they would remain subjects of the crown, or become citizens of the State,—which is the Revolutionary right of election;<sup>1</sup> but, for all practical purposes, the rule was, as stated by Mr. Justice Johnson, in *Shanks v. Dupont*,<sup>2</sup> that "those who owed allegiance to the king, as of his province of South Carolina, thenceforward owed allegiance to South Carolina." One of the first cares of the new sovereignties was to enforce this obligation.

The Pennsylvania Constitution of Sept. 28, 1776, provided (chap. 2, sect. 40): "Every officer, whether judicial, executive, or military, in authority under this Commonwealth, shall take the following oath or affirmation of allegiance before he enter on the execution of his office: The oath or affirmation of allegiance. 'I, —, do swear (or affirm) that I will be true and faithful to the Commonwealth of Pennsylvania; and that I will not, directly or indirectly, do any act or thing prejudicial or injurious to the constitution or government thereof, as established by the convention.'"<sup>3</sup> In the same State, an act of Jan. 28, 1777, provided: "That so much of every law or act of the General

<sup>1</sup> See *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet. 160; *Stringer v. Phillis*, 2 Hayw. (N. C.) 158; 1 South Carolina Stats., Constitutional, 135, 147; 1 Laws of Maryland (Maxcy's ed.), 404; *Hebron v. Colchester*, 5 Day, 169; *Martin v. Commonwealth*, 1 Mass. 347, 397; *Gardner v. Ward*, 2 id. 236; *Kilham v. Ward*, id. 244; *Palmer v. Downer*, id. 179; *McIlvaine v. Coxe*, 2 Cr. 280; s. c. 4 Cr. 209; *Phipps's Case*, 2 Pick. 394; *Respublica v. Chapman*, 1 Dall. 53; and *Jackson v. White*, 20 Johns. 313.

<sup>2</sup> 3 Pet. 225.

<sup>3</sup> 6 Pa. Laws (ed. 1803), App. 79.

Assembly of the Province as orders the taking or subscribing any oath, affirmation, or declaration of allegiance or fidelity to the King of Great Britain or his successors, shall be, and is hereby, declared of no force or effect.”<sup>1</sup> An act of Feb. 11, 1777, provided: “That all and every person and persons (except prisoners of war) now inhabiting, residing, or sojourning within the limits of the State of Pennsylvania, or that shall voluntarily come into the same hereafter, to inhabit, reside, or sojourn, do owe and shall pay allegiance to the State of Pennsylvania;”<sup>2</sup> and “An Act obliging the white male inhabitants of this State to give assurances of allegiance to the same,” passed June 13, 1777, prescribes this oath: “I, —, do swear (or affirm) that I renounce and refuse all allegiance to George the Third, king of Great Britain, his heirs, and successors; and that I will be faithful, and bear true allegiance, to the Commonwealth of Pennsylvania, as a free and independent State.”<sup>3</sup>

The Delaware Constitution of Sept. 11, 1776, art. 22,<sup>4</sup> prescribed this oath or affirmation for members of the legislature, and all officers: “I, A. B., will bear true allegiance to the Delaware State, submit to its constitution and laws, and do no act wittingly whereby the freedom thereof may be prejudiced.”

<sup>1</sup> 1 Pa. Laws (ed. 1803), App. 141.

<sup>2</sup> *Id.* 146.

<sup>3</sup> Penn. State Laws, 62.

<sup>4</sup> The Maryland Constitution of Aug. 14, 1776, provided that all officers should take this oath: “I, A. B., do swear that I do not hold myself bound in allegiance to the King of Great Britain, and that I will be faithful and bear true allegiance to the State of Maryland.” Art. 55.

The Georgia Constitution of Feb. 5, 1777, required every voter to take this oath or affirmation: “I, A. B., do voluntarily and solemnly swear (or affirm, as the case may be) that I do owe true allegiance to this State, and will support the constitution thereof; so help me, God.” Art. 14.

By “An Act for prescribing and establishing an oath of fidelity and allegiance,” passed in 1777, Massachusetts provided the following: “I, A. B., do swear (or affirm) that I will bear true faith and allegiance to the State of Massachusetts Bay, and will faithfully support and maintain and defend the same against George the Third, king of Great Britain, his abettors, and all other enemies and opposers whatsoever,” &c. “Ancient Laws and Charters of Massachusetts Bay,” 700. And in the Massachusetts Constitution of March 2, 1780, it was provided, that members of the General Court, or Legislature, and all officers, should acknowledge the independence and sovereignty of the State, and take this oath: “I do swear that I will bear true faith and allegiance to the said Commonwealth, and that I will defend the same against traitorous conspiracies, and all hostile attempts whatsoever; and that I do renounce and abjure all allegiance, subjection, and obedience to the king, queen, or government of Great Britain, as the case may be, and every other foreign power whatsoever,” &c. Part 2, chap. 6, art. 1.

In May, 1777, the General Assembly of Virginia passed “An Act to oblige the



Before leaving this branch of the subject, it may be remarked, that Washington strongly favored the requiring of an oath of

free male inhabitants of this State above a certain age to give assurances of allegiance to the same," which reads: "Whereas, allegiance and protection are reciprocal, and those who will not bear the former are not entitled to the benefits of the latter, therefore, *Be it enacted by the General Assembly*, that all free-born male inhabitants of this State above the age of sixteen years, except imported servants," &c., shall take this oath: "I do swear (or affirm) that I renounce and refuse all allegiance to George the Third, king of Great Britain, his heirs and successors; and that I will be faithful, and bear true allegiance, to the Commonwealth of Virginia, as a free and independent State." 9 Hen. Stat. 281.

Feb. 13, 1777, the General Assembly of South Carolina adopted "An Ordinance for establishing an oath of abjuration and allegiance," to be tendered to all king's officers or suspects in the State, who, in default of taking the same, should be banished, and, on return, put to death; the oath being: "I, A. B., do acknowledge the State of South Carolina is, and of right ought to be, a free, sovereign, and independent State, and that the people thereof owe no allegiance or obedience to George the Third, king of Great Britain, and I do renounce, refuse, and abjure any allegiance or obedience to him; and I do swear (or affirm, as the case may be) that I will, to the utmost of my power, support, maintain, and defend the said State against the said King George the Third, and his heirs and successors, and his or their abettors, assistants, and adherents. And I do further swear, that I will bear faith and true allegiance to the said State, and, to the utmost of my power, will support, maintain, and defend the freedom and independence thereof." 1 S. C. Stats. Const. 135. March 28, 1778, the same General Assembly passed "An Act to oblige every free male inhabitant of this State above a certain age to give assurance of fidelity and allegiance to the same," which provides, "That every free male person within this State above the age of sixteen years shall take and subscribe the following oath or affirmation: 'I, A. B., do swear (or affirm, as the case may be) that I will bear faith and allegiance to the State of South Carolina, and will faithfully support, maintain, and defend the same against George the Third, king of Great Britain, his successors, abettors, and all other enemies and opposers whatsoever; and will, without delay, discover to the executive authority, or some one justice of the peace in this State, all plots and conspiracies that shall come to my knowledge against the said State, or any other of the United States of America. So help me, God.'" Id. 147.

By resolutions of July 16, 1776, the New York Congress declared "That all persons abiding within the State of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the State." *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet. 99, and the State Constitution of April 20, 1777, abrogates (art. 35), "such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the Colony of New York, as together did form the law of the said Colony on the nineteenth day of April, in the year of our Lord one thousand seven hundred and seventy-five, . . . as concern the allegiance heretofore yielded to, and the supremacy, sovereignty, government, or prerogatives claimed or exercised by the King of Great Britain and his predecessors over the Colony of New York and its inhabitants;" and empowers (art. 42) the legislature to naturalize such foreigners as settle in, and "shall take an oath of allegiance to, this State."

The North Carolina Constitution of Dec. 18, 1776, provides (art. 40), "That every foreigner who comes to settle in this State, having first taken an oath of allegiance

allegiance, as witness his proclamation of Jan. 25, 1777, prescribing such obligation within his sphere of command,<sup>1</sup> and his letter to Congress of Feb. 5, 1777, saying: "I should strongly recommend to every State to fix upon some oath or affirmation of allegiance to be tendered to all the inhabitants without exception, and to outlaw those that refuse it;"<sup>2</sup> and in the course of some controversy as to the oath of allegiance to the United States, proposed in the proclamation, Abraham Clark, of New Jersey, one of the signers of the Declaration of Independence, says: "Such an oath is absurd before our confederation takes place. Each State requires an oath to that particular State."<sup>3</sup>

Upon the Declaration, then, the allegiance of the colonist was simply transferred, not changed. There was an alteration in the direction, but none in the nature, of the obligation; the only difference recognized being, that, whereas he had been a British, he was now an American, *subject*; and, accordingly, that word was freely used.

The Massachusetts Constitution of March 2, 1780, speaks of "moneys" paid by the *subject* to the support of public worship,"<sup>4</sup> and declares that "every denomination of Christians, demeaning themselves peaceably, and as good *subjects* of the Commonwealth, shall be equally under the protection of the law;"<sup>5</sup> and that "every *subject* of the Commonwealth" shall have legal redress of wrongs;<sup>6</sup> and "no *subject* ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature."<sup>7</sup> The

to the same, may purchase, or by other just means acquire, hold, and transfer, land or other real estate; and, after one year's residence, shall be deemed a free citizen."

A New Jersey act of Dec. 11, 1778, attainting sundry refugee inhabitants of that State, speaks of their failure to profess "allegiance to the present government by taking the oaths or affirmations prescribed." N. J. Laws, 1800, p. 41. The Rhode Island act, above mentioned, "for repealing an act entitled 'An Act for the more effectually securing to His Majesty the allegiance of his subjects in this his Colony and Dominions of Rhode Island and Providence Plantations,'" requires an oath of each inhabitant, "to be true and faithful unto this Colony;" and it is to this, no doubt, the Congressional Collection of Constitutions of 1780, above mentioned, refers, when saying, under the head of Rhode Island, that the royal charter remained the organic law of that State, but that "the oaths of allegiance and of office are made conformable to the principles of the Revolution." Id. 46. The same compilation, in speaking of the Constitution of Connecticut, says, one otherwise qualified "is admitted a freeman on his taking an oath of fidelity to the State." Id. 48.

<sup>1</sup> 4 Writings of Washington, 297.

<sup>2</sup> Id. 812.

<sup>3</sup> Id. 299.

<sup>4</sup> Part 1, art. 3.

<sup>5</sup> Id.

<sup>6</sup> Id. art. 11.

<sup>7</sup> Id. art. 25.

New York Constitution of April 20, 1777, provided "that it shall be in the discretion of the legislature to naturalize all such persons . . . as shall come to settle in and become *subjects* of this State;"<sup>1</sup> and sundry resolutions of that body, of Nov. 19, 1781, in reference to the then vexed question of the New Hampshire Grants, speak of "the loss of life of one of the *subjects* of this State, in the execution of his lawful duty," at the hands of "the revolted *subjects* of this State," *i. e.*, the Vermonters;<sup>2</sup> and in the constitution framed Dec. 25, 1777, Chap. 2, art. 36, by these revolted subjects of New York, and under which Vermont was admitted as a State in 1791, it is provided that a foreigner naturalized in Vermont "shall be entitled to all the rights of a natural-born *subject* of this State."<sup>3</sup>

<sup>1</sup> Art. 42.

<sup>2</sup> 4 Journ. Cong. (Way & Gideon ed.) 6.

<sup>3</sup> It is also to be remarked, that when the New York Constitution of 1777 was framing, and a clause granting "to all mankind the free exercise of religious profession and worship" was under consideration, John Jay, afterwards Chief Justice of the Supreme Court of the United States, proposed to except Roman Catholics, unless they would make oath "that they verily believe in their consciences that no pope, priest, or foreign authority on earth, has power to absolve the *subjects* of this State from their allegiance to the same." Spark's "Life of Gouverneur Morris," vol. i. p. 124.

A New Jersey act of Dec. 11, 1778, provides for the attain of every inhabitant who had left that State after April 19, 1775, and before Oct. 4, 1776, "and who hath not since returned and become a *subject* in allegiance to the present government by taking the oaths or affirmations required." N. J. Laws (ed. 1800), p. 41; and see *McIlvaine v. Cox's Lessee*, 2 Cr. 280; s. c. 4 Cr. 209. A Pennsylvania act of March 6, 1778, "for the attainder of divers traitors, if they render not themselves by a day certain, and for vesting their estates in this Commonwealth," &c., provides that, "Whereas, Joseph Galloway, &c., being all *subjects* and inhabitants of the State of Pennsylvania, have most traitorously, and wickedly, and contrary to the allegiance they owe the State, joined and adhered to, and still do adhere to and knowingly aid and assist, the army of the King, of Great Britain, now enemies at open war against this State and the United States of America," they are to be attain of high treason if they render not themselves; also, "That all and every person and persons, being *subjects* or inhabitants of this State," assisting the enemy, shall be guilty of high treason; also, "That all and every the *subjects* or inhabitants of this State," serving the enemy in military or civil office, are similarly guilty; and "the estates, real and personal, of the *subjects* or inhabitants of this State," so guilty, are forfeit. 2 Laws, Penn. (ed. 1803), p. 165.

A Delaware act of June 11, 1788, after setting out that further provision should be made touching aliens, "for enabling them to enjoy the rights and privileges of natural-born *subjects* of this State," proceeds to enact that any foreigner then resident, or thereafter coming to reside, in Delaware, shall, on taking the oath of allegiance, *ut sup.*, be "a natural-born *subject* of this State, and shall be thenceforth entitled to all the immunities, rights, and privileges, of a natural-born *subject* of this

The same term was freely used in the operations of the general government. Washington justified his proclamation, above

State," saving an exclusion from office for two years. 2 Laws of Delaware, 920. A Maryland statute of February, 1777, "to punish certain crimes and misdemeanors, and to prevent the growth of toryism," is particularly express. After beginning, "Whereas, the clemency of this State towards such of its *subjects* and inhabitants as are inimical to its freedom and independence has not had the desired effect," it proceeds to give a long catalogue of crimes, as treason, misprision of treason, &c., and affix punishments thereto, "if any *subject* or inhabitant of this State" commit the same; and provides for the arrest of any person travelling through Maryland without a safe-conduct from "the State of which he is a *subject* or resident." 1 Laws of Maryland (Maxey's ed.), 338. Another act of October, 1777, provides, "That if any *subject* or inhabitant of this State shall destroy any magazine, &c., or destroy or carry off any vessel, belonging to the United States, or to this or any other of the United States, or to any *subject* of this or any other of the United States," he shall suffer death. Id. 343. So, an "Act for Naturalization," passed in July, 1779, provides that "Whereas, aliens might come in and settle in this State if they were made partakers of the advantages and privileges which the natural-born *subjects* of this State do enjoy," such persons, on taking this oath, "I, A. B., do swear, or affirm, that I will hereafter become a *subject* of the State of Maryland, and will be faithful, and bear true allegiance, to the said State, and that I do not hold myself bound to yield any allegiance or obedience to any king or prince, or any other State or government," "shall thereupon and thereafter be deemed, adjudged, and taken to be, a natural-born *subject* of this State, and shall be thenceforth entitled to all the immunities, rights, and privileges, of a natural-born *subject* of this State; provided, that no person who shall become a natural-born *subject* of this State by virtue of this act" shall hold office until seven years after naturalization. Id. 362. An act of October, 1780, attributes to British perfidy "any damage or injury sustained by any of the *subjects* of this State, by the war;" ordains that "no *subject* of this State shall remit to his British creditor;" also, "That the *subjects* of this State who are creditors of British subjects shall be indemnified out of the effects of their individual debtors;" declares that persons leaving Maryland before April 30, 1775, if returning by March 1, 1782, and taking the oath of allegiance, may thereby entitle themselves "to the benefit of a *subject* from the time of the Revolution, which took place on the fourth day of July, seventeen hundred and seventy-six." Id. 404. Still another act, of May, 1781, confiscates "all the property of the persons commonly called by the name of the Principio Company, except the part or share or interest of Thomas Russell, a *subject* of this State, and one of said company, and except also the part, share, or interest, of any other *subject* of this, or *subject* of any other of the United States; and provides that, "It being represented to this General Assembly that a certain Mr. Washington, a *subject* of the State of Virginia, is entitled to one undivided twelfth part thereof," inquiry shall be made as to the claims of "the said Mr. Washington, or any other *subject* of this or any other of the United States." Id. 413. A North Carolina act of this general era, provides, "That if it shall appear to any county court that any person, being a *subject* of this State, or of any of the United States, has, or pretends to have," a claim upon sequestered property, he shall have the same inquired into; "That all persons, being *subjects* of this State, or of any of the United States," establishing such claims, are to have the same satisfied out of such property; and "That, if any *subject* of this State, or of any of the United States,"

referred to, requiring an oath of allegiance to the United States, on this ground, among others, "that every man who receives protection from, and as a *subject* of, any State, not being conscientiously scrupulous against bearing arms, should stand ready to defend the same against hostile invasion ;"<sup>1</sup> and it may be added, that, in acknowledging, in December, 1789, the congratulations of the Catholic clergy and laity on his "being called, by a unanimous vote, to the first station of a country in which that unanimity could not have been obtained without the previous merit of unexampled services, of eminent wisdom, and unblemished virtue," President Washington closed his reply "to the Roman Catholics in the United States of America," by saying, "And may the members of your society in America, animated alone by the pure spirit of Christianity, and still conducting yourselves as the faithful *subjects* of our free government, enjoy every temporal and spiritual felicity."<sup>2</sup> In 1778, Congress, upon a representation that certain persons "are well attached to the cause and rights of America, and willing and desirous to become *subjects* of the United States," directed the issual of passports, in the form following :—

*"To all to whom these presents shall come :*

"We, the Congress of the United States of America, send greeting: Know ye that we, being well satisfied of the fidelity and attachment of —, now an inhabitant of the Island of New Providence, and being notified of his design to remove from the said island to some place within the jurisdiction and authority of the said States, with intent to become *subject* to the same : Now, therefore, by these presents, we do advise, request, and require, all captains and commanders of ships and vessels of war, whether public or private, holding commissions under us, and all other persons whom it may concern, whether *subjects* of said States, or of any of them, or of princes their allies, to permit the said —, his family and property, safely to pass," &c. 1 Sec. Journ. 87.<sup>3</sup>

cannot in such case be satisfied out of the personalty, then the realty shall be sold. 1 N. C. Laws (ed. 1821), p. 37. A South Carolina act of Feb. 26, 1782, speaks of "all persons, *subjects* of this or any other of the United States" (Grimke's S. C. Laws, 310); and as late as the end of the first presidential term we read, in the Vermont Constitution of July 9, 1793, that an alien, upon residing there one year, and professing allegiance, shall be "entitled to all rights of a natural-born *subject* of this State."

<sup>1</sup> 4 Writings of Washington, 297.

<sup>2</sup> 12 id. 179.

<sup>3</sup> In 1780 Congress enjoins the pseudo-government of the New Hampshire

Judging, then, from these enunciations, the Declaration of Independence was not understood by the statesmen and lawyers of the Revolutionary era as working any change in the doctrine of allegiance as laid down in Blackstone. The subject was still a subject, and still bound to his sovereign in an allegiance which no act of his own could dissolve. As, however, there have been some judicial expressions to the effect that there is something in the nature of republican government repugnant to the rule *nemo potest exuere patriam*, and as certain early legislation of some of the States is occasionally referred to in support of this view, we may properly enough consider this branch of the subject before proceeding.

The Constitution of Pennsylvania, of Sept. 2, 1790, has this provision: "That emigration from the State shall not be prohibited." And in *Lynch v. Clark*<sup>1</sup> and *Jackson v. Burns*,<sup>2</sup> the court seems inclined to consider the word *emigration* as synony-

Grants to "abstain from all acts of authority, civil or military, over the inhabitants of any town or district who hold themselves to be *subjects* of, and to owe allegiance to, any of the States claiming the jurisdiction of the said territory," — i.e., Massachusetts, New Hampshire, and New York (3 Journ. 463); and repeats the admonition in 1782, as to "sundry inhabitants of the said district professing to be *subjects* of, and to owe allegiance to, the State of New York" (4 Journ. 112); and resolves, "That the supreme executives of the States of New Hampshire, Massachusetts, Connecticut, and New York, be furnished with a copy of Christopher Osgood's declaration, in order that they may have due information of the treasonable practices with which some of their *subjects* are charged" (1 Sec. Journ. 245); and in proclaiming, in 1783, the armistice preceding the peace, says: "We hereby strictly charge and command all our officers, both by sea and land, and other *subjects* of these United States, to forbear all acts of hostility, either by sea or land, against his Britannic Majesty or his subjects." 4 Journ. 187. The treaty of Feb. 6, 1778, with France, provides (art. 30), that "The more to favor and facilitate the commerce which the *subjects* of the United States may have with France," the king will open new free ports, and "continue to the *subjects* of the said States" the ports then open, "of all which free ports the said *subjects* of the United States shall enjoy the use," &c. (U. S. Rev. Stats., Treaties, 204); and in the original eleventh article, the exportation of molasses from the French Antilles "by the *subjects* of any of the United States," was regulated. Id. 206. The treaty of Oct. 8, 1782, with the Netherlands, provides that "The *subjects* and inhabitants of the said United States of America" are only to pay the tolls of the most favored nation; "nor shall any *subject* or inhabitant of the said United States of America, or of any of them," privateer against their High Mightinesses or their subjects. Id. 538. The armistice of Jan. 20, 1783, between Great Britain and the United States, consequent on that of the same day between England, France, and Spain, declares "that the said United States of North America, their *subjects* and their possessions, shall be comprehended in the above-mentioned suspension of arms." Id. 264.

<sup>1</sup> 1 Sandf. Ch. 538.

<sup>2</sup> 3 Binney, 76.

mous with *expatriation*. It is, however, to be noted that the Constitution of Kentucky of Aug. 17, 1799, had a like provision : "<sup>1</sup> "That emigration from this State shall not be prohibited ;" and that in deciding, in *Alsberry v. Hawkins*,<sup>2</sup> that a citizen of Kentucky had become a citizen of the Republic of Texas, the court did not put his right to expatriate himself on this ground. Moreover, the original of the provision is to be found in the Pennsylvania Constitution of Sept. 28, 1776, which reads : "That all men have a natural, inherent right to emigrate from one State to another that will receive them, or to form a new State in vacant countries, or in such countries as they can purchase, whenever they think that thereby they may promote their own happiness ;"<sup>3</sup> and that this was not contemporaneously understood as meaning that the citizen of Pennsylvania might make himself an alien to Pennsylvania at will, is apparent from *Respublica v. Chapman*.<sup>4</sup> In that case, it was shown that Chapman, a native Pennsylvanian, had, in December, 1776, withdrawn himself from the State, and adhered to the British ; and upon this the Attorney-General moved his attaint, as one of the persons named in the act of March 6, 1778, *ut sup.*, declaring guilty of high treason sundry subjects of Pennsylvania who had, "contrary to the allegiance they owe the State," gone over to the enemy. For the defence it was not urged that the constitutional provision just cited authorized the prisoner to absolve himself from his allegiance to the State at pleasure ; but, on the contrary, counsel admitted the rule *nemo potest exuere patriam*, and placed his reliance on the ground that Chapman never had been a subject of Pennsylvania, and bound in allegiance thereto, having left the State in December, 1776, prior to the act of Feb. 11, 1777, *ut sup.*, — which ground the court sustained. It seems to have been conceded on all sides, that, if Chapman had departed after Feb. 11, 1777, and then refused to render himself, as required by the act of March 6, 1778, he could indubitably have been attainted as having sought to transfer his fealty to the crown, "contrary to the allegiance he owed the State." Further than this, in *Beavers v. Smith*,<sup>5</sup> it is either denied or doubted that emigration

<sup>1</sup> Art. 10, sect. 27.<sup>2</sup> 9 Dana, 178.<sup>3</sup> Chap. 1, art. 15.<sup>4</sup> 1 Dall. 63.<sup>5</sup> 11 Ala. N. S. 20 ; Duer's Lect. 802 ; Rawle on the Constitution, chap. 9 ; and 2 Kent Com. 44.

in this connection means expatriation; and see Rawle's argument on the first hearing of *McIlvaine v. Coxe's Lessee*, in 2 Cr. 280, which appears to have had weight with the court in pronouncing judgment in 4 Cr. 209.

The indications are that this peculiar provision of the early constitutions of Pennsylvania never was intended to have any reference to the matter of expatriation, but owes its origin to the anxious desire of the statesmen of the Revolutionary era, that there should be a free intercourse between the people of the several States. Under the common law the sovereign could, at pleasure, forbid the subject to depart from out his jurisdiction;<sup>1</sup> and it seems to have been felt that no true union of the thirteen States was possible, if each State could inhibit its citizens from going into any other State, or allow them to go into some, but not into others. Hence, no doubt, the provision in the Pennsylvania Constitution of 1776, prohibiting the government of that State from preventing the inhabitant of Pennsylvania from emigrating at pleasure. Two years later, the Articles of Confederation applied the same restriction to all the States, and said, in terms, that the object was to facilitate free intercourse between the people of the several States, the sixth article reading thus:—

“The better to secure and perpetuate mutual friendship and intercourse among the people of the different States of this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from every other State.”

When the Constitution of the United States was adopted, this latter clause was omitted, that instrument simply saying: “The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,”<sup>2</sup> without further providing, as did the articles, that “the people of each State shall have free ingress and regress to and from every other State” (i.e., that no State shall pass any law prohibiting emigration); and while this omission is in no way material, — for surely, if a citizen of one State is entitled to the privileges of citizenship in

<sup>1</sup> 1 Bla. Com. 138, 266.

<sup>2</sup> Art. 4, sect. 2.



any other State, his own State cannot negative that right by a standing *ne exeat*,<sup>1</sup> — the people of Pennsylvania saw fit, in framing their State constitution of Sept. 2, 1790, to provide, “that emigration from the State shall not be prohibited;”<sup>2</sup> and from this original the provision found its way into a number of other State constitutions.<sup>3</sup> In the Mississippi Constitution, the provision is, that “Emigration from this State shall not be prohibited, nor shall any white citizen of this State ever be exiled, under any pretence whatever;” and in the Alabama Constitution: “Emigration from this State shall not be prohibited, nor shall any citizen be exiled,” — which provisions clearly relate to personal liberty, or the right of locomotion, alone, and have no reference to the tie of allegiance or the nature of national character. “This personal liberty,” says Blackstone,<sup>4</sup> “consists in the power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct, without imprisonment or restraint, unless by due course of law;” and he then proceeds to show that, according to law, the subject may, as a punishment for crime, be sent *out* of the realm;<sup>5</sup> or, by a sort of corporeal eminent domain, be kept *in* the realm,<sup>6</sup> without his consent. To abrogate these qualifications, and restore the old common-law right of personal liberty, whereby the subject might remain in or depart out the realm at his pleasure, was no doubt the sole aim of all these provisions touching emigration and exile to be found in American constitutions. “By the common law, every man may go out of the realm, for whatever cause he pleaseth, without obtaining the king’s leave, provided he is under no injunction of staying at home.”<sup>7</sup> But it was never supposed this right of emigration or locomotion touched the allegiance of the emigrant: to the contrary, “*Qui abjurat regnum, amittat regnum, sed non regem; amittat patriam, sed non patrem patriæ*; for, notwithstanding the abjuration, he oweth the king his allegiance, and he remaineth within the king’s protection; for the king may pardon

<sup>1</sup> And see *Crandall v. Nevada*, 6 Wall. 159.

<sup>2</sup> Art. 9, sect. 25.

<sup>3</sup> As that of Vermont of July 9, 1793 (chap. 1, art. 19); Kentucky, Aug. 7, 1790 (art. 10, sect. 27); Louisiana, Jan. 22, 1812 (art. 6, sect. 22); Indiana, June 29, 1816 (art. 1, sect. 23); Mississippi, Aug. 15, 1817 (art. 1, sect. 27); Alabama, Aug. 2, 1819 (art. 1, sect. 27); and Missouri, June 12, 1820 (art. 13, sect. 21).

<sup>4</sup> 1 Com. 135.

<sup>5</sup> *Id.* 138.

<sup>6</sup> *Id.* 265.

<sup>7</sup> *Id.* 265.

and restore him to his country again. Allegiance is a quality of the mind, and not confined to any place."<sup>1</sup>

Another instance commonly cited as showing that, upon the Revolution, a new conception of allegiance obtained is the expatriation act of Virginia, referred to in *Talbot v. Janson*,<sup>2</sup> *Alsberry v. Hawkins*,<sup>3</sup> *Lynch v. Clark*,<sup>4</sup> *Murray v. McCarty*,<sup>5</sup> and possibly other cases. The act, which is entitled "An Act declaring who shall be deemed citizens of this Commonwealth," and was passed in 1779,<sup>6</sup> reads thus:—

"In order to preserve to the citizens of this Commonwealth that natural right which all men have of relinquishing the country in which birth or other accident may have thrown them, and seeking subsistence and happiness wheresoever they may be able or may hope to find them, and to declare unequivocally what circumstances shall be deemed evidence of an intention in any citizen to exercise that right,

"*It is enacted and declared*, That whensoever any citizen of this Commonwealth shall by word of mouth, in the presence of the court of the county wherein he resides, or of the general court, or by deed in writing under his hand and seal, executed in the presence of three witnesses, and by them proved in either of the said courts, openly declare to the same court that he relinquishes the character of a citizen, and shall depart the Commonwealth, such person shall be considered as having exercised his natural right of expatriating himself, and shall be deemed no citizen of this Commonwealth from the time of his departure."

And, *per contra*, of course, until he shall make such declaration and so depart, he shall still be deemed a citizen. While, therefore, this act speaks of a natural right of expatriation, it is in reality simply a standing license upon the part of the sovereign that the subject may absolve himself from his allegiance thereto on compliance with the terms set out in the license; and this, in turn, is but the common-law doctrine, that, while the subject cannot of his own act absolve himself from his allegiance, with the concurrent act of his sovereign he may. And accordingly, in *Murray v. McCarty*,<sup>7</sup> Judges Roane and Iredell concurred that a Virginian could only expatriate himself according to the Virginia law; Cabell, J., *contra*.

<sup>1</sup> *Calvin's Case*, 7 Rep. 7.

<sup>2</sup> 9 Dana, 178.

<sup>3</sup> 2 Mumf. 398.

<sup>4</sup> 2 Mumf. 893.

<sup>5</sup> 8 Dall. 138.

<sup>6</sup> 1 Sandf. Ch. 538.

<sup>7</sup> 10 Hen. Stat. 129.

Lastly, we may remark that, in *Lynch v. Clark*,<sup>1</sup> it is said, "The right to expatriate was recognized in Pennsylvania and Virginia while they were colonies;" but we have never been able to find authority for this statement, and must consider it ill-advised. Surely it never was law that the colonial assemblies could absolve the inhabitants of those provinces from their allegiance to the crown; and that no right of absolution existed in the colonists themselves seems equally clear. In 1704 the Attorney-General Northey certified his opinion in the case of one Gillingham, a natural-born subject of Queen Anne, who had settled in St. Thomas, and there taken an oath of allegiance to the King of Denmark, that "his being naturalized without the license of Her Majesty will not discharge him from the natural allegiance he owes Her Majesty;"<sup>2</sup> and some forty years later, the rule *nemo potest exuere patriam*, though roughly questioned at bar, was sustained in *Aeneas McDonald's Case*,<sup>3</sup> as universally applicable.

Resuming now the thread of our narration, it does not appear that the Articles of Confederation made any change in the common-law doctrine of allegiance, though it may be noted, — and in some future paper the author of this sketch may touch more at large upon this interesting subject, — that while this form of government existed, the idea of a citizenship of the United States as distinct from a citizenship of some one particular State began to assume consistency. It need only be remarked, before passing from the Confederation era, that the word "citizen" began about this time to supplant the word "subject" in the legislation of the States; but, lest it may be thought that this change in phraseology imports some corresponding alteration in the then current conception of allegiance, we may refer to the language of the Supreme Court of the United States in speaking of membership of a nation in *Minor v. Happersett*:<sup>4</sup> —

"For convenience, it has been found necessary to give a name to this membership. The object is to designate, by a title, the person, and the relation he bears to the nation. For this purpose, the words 'subject,' 'inhabitant,' and 'citizen,' have been used; and the choice between them is sometimes made to depend on the form of the government. 'Citizen' is now more commonly employed, however; and, as it has been considered better

<sup>1</sup> 1 Sandf. Ch. 538.

<sup>2</sup> Ecst. 184.

<sup>3</sup> Chalm. Colonial Op. 645.

<sup>4</sup> 21 Wall. 166.

suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation, and in the Constitution of the United States. When used in this sense, it is understood as conveying the idea of membership of a nation, and nothing more."

Coming now to the Constitution of the United States, we find the distinction between a citizen of a State and a citizen of the United States recognized in that instrument in terms;<sup>1</sup> and while it was in some doubt, up to the adoption of the Fourteenth Amendment, whether one could be a citizen of the United States except as he was a citizen of one of the States composing the Union,<sup>2</sup> the distinction between the two citizenships, so far as respects expatriation, was recognized at an early day; and in *Talbot v. Janson*,<sup>3</sup> it was held, that, whatever might be the force of the Virginia expatriation act, *ut sup.*, as respects citizenship of Virginia, it could in no wise affect the Federal citizenship of the Virginian. He was still a citizen of the United States, though, possibly, no longer a citizen of the State of Virginia; and to this doctrine Roane, J., said, in *Murray v. McCarty*,<sup>4</sup> where this act again came under consideration, that he entirely subscribed. In *State v. M' Meekin*, and *State v. McCready*,<sup>5</sup> it was held that the citizen of a State, being also a citizen of the United States, owes allegiance to the United States as well as to the State; and the existence of this bi-fold allegiance was reiterated in the *Slaughter-House Cases*,<sup>6</sup> and in the Louisiana Enforcement Act Case, decided by the Supreme Court of the United States October Term, 1875. In a consideration, therefore, of the matter of expatriation, we are brought face to face, in the course of our historical survey, with the fact that the citizen of a State owes allegiance to the United States as well as to the State; and it might, therefore, be considered that the scope of the question propounded at the head of this paper is too narrow, the query being confined simply to Federal citizenship. But the fact is, that, since the adoption of the Fourteenth Amendment, the Constitution of the United States disposes of the matter of expatriation as respects citizen-

<sup>1</sup> Art. 1, sect. 2, cl. 2; *Id.* sect. 3, cl. 3; art. 2, sect. 1, cl. 5; art. 3, sect. 2, cl. 1; art. 4, sect. 2, cl. 1. — Eleventh Amendment.

<sup>2</sup> *Slaughter-House Cases*, 16 Wall. 36.

<sup>3</sup> 3 Dall. 133 (1795).

<sup>4</sup> 2 Mumf. 898.

<sup>5</sup> 2 Hill (S. C.), 1.

<sup>6</sup> 16 Wall. 74.

ship of a State. We have seen that the constitutional provision, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," inferentially forbids any State from prohibiting the departure therefrom of its citizens into other States, — since of what avail to give the New Yorker in Georgia the privileges and immunities of a Georgian, if New York may forbid his departure into Georgia, — but, while this gives the New Yorker the right to remove to and reside in Georgia, it does not, *proprio vigore*, work any change in his State citizenship. He is still a citizen of New York, and, as New York (while the question was open) recognized no right of expatriation,<sup>1</sup> could not become, *quoad* New York at least, a citizen of Georgia, despite his residence in that State. As respects capacity to sue in the Federal courts, such a removal and residence would make him a citizen of Georgia;<sup>2</sup> but as regards any matter of State jurisdiction proper to New York, he would still be a citizen of New York.<sup>3</sup>

Now, however, the Constitution of the United States provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside," — the words "and subject to the jurisdiction thereof" having been inserted in the amendment "to exclude from its operations children of ministers, consuls, and citizens or subjects of foreign States, born within the United States,"<sup>4</sup> — and, in the case we have supposed, the New Yorker, by virtue of his residence in Georgia, ceases to be a citizen of New York, and becomes a citizen of Georgia; or, in other words, the Fourteenth Amendment amounts, if our view be correct, to a standing license on the part of each State, that the citizen thereof may expatriate himself therefrom, or absolve himself from his allegiance thereto, by an actual departure therefrom, and the establishment of a residence in some other State. In this view it is more of historical interest than present legal value to note the position formerly occupied by the States in

<sup>1</sup> *Ludlam v. Ludlam*, 35 N. Y. 356.

<sup>2</sup> *Cooper v. Galbraith*, 8 Wash. C. C. 546; *Case v. Clark*, 5 Mason, 70; *Gardner v. Sharp*, 4 Wash. C. C. 609; *Read v. Bertrand*, id. 514; *Butler v. Farnsworth*, id. 101; *Prentiss v. Barton*, 1 Brock. 389; *Evans v. Davenport*, 4 McL. 574.

<sup>3</sup> See Roane, J., in *Murray v. McCarty*, 2 Mumf. 405, and Cushing's remarks, 8 Op. 139.

<sup>4</sup> *Slaughter-House Cases*, 16 Wall. 74.

the matter of expatriation, and we need do no more than refer to the cases.<sup>1</sup> In Massachusetts, Connecticut, New Jersey, and New York, the rule *nemo potest exuere patriam* was upheld; in Pennsylvania a constitutional, and in Virginia a statutory, right of expatriation was recognized. In South Carolina, a right of expatriation, independent of legislation, was intimated,<sup>2</sup> and declared in Kentucky. In North Carolina and Mississippi the inclination was contrary to, and in Alabama in favor of, a right of expatriation.

The Federal cases are uniform and instructive. In *Talbot v. Janson*,<sup>3</sup> the case was this: Ballard, a native of Virginia, who had renounced his citizenship of that State, in conformity to its expatriation act, *ut sup.*, and Talbot, another Virginian, who had gone to the French Antilles, and there taken an oath of allegiance to France, captured, under a French commission, a Dutch brigantine; and Janson, master, prayed restitution, on the ground that Talbot and Janson were both citizens of the United States, and so incapable of making good prize; and it was so adjudged. As to Ballard, it was said, that, whatever might be the operation of the Virginia expatriation act, it was confined simply to citizenship of that State, and in no manner divested him of his original character as a citizen of the United States; and as to Talbot, that he did not cease to be a citizen of the United States because "he went to the West Indies and took an oath to the French Republic, and became a citizen there."

In *United States v. Williams*,<sup>4</sup> the case was this: Isaac Williams was indicted in two cases for having, contrary to his obligations as a citizen of the United States under the Anglo-American treaty of 1794, cruised, under a French commission,

<sup>1</sup> Namely, as to Massachusetts (*Ainslie v. Martin*, 6 Mass. 460); Connecticut (*Isaac Williams's Case*, 4 Hall's Am. L. J. 460; s. c. 2 Cr. 82, n.; 1 Tuck. Bla. Com. pt. 2, p. 370, n.); New York (*Fish v. Stoughton*, 2 Johns. 407; *Lynch v. Clark*, 1 Sandf. Ch. 538; *Ludlam v. Ludlam*, 35 N. Y. 858); New Jersey (*McIlvaine v. Cox's Lessee*, 2 Cr. 280; s. c. 4 Cr. 209); Pennsylvania (*Jackson v. Burns*, 3 Binney, 75); Virginia (*Murray v. McCarty*, 2 Mumf. 898; *Talbot v. Janson*, 8 Dall. 133); North Carolina (*Stringer v. Phillis*, 2 Hayw. 158; *State v. Manuel*, 8 Dev. & Bat. 24, 26); South Carolina (*Allegiance Cases*, 2 Hill, 1); Alabama (*Beavers v. Smith*, 11 Ala. n. s. 20); Kentucky (*Shearer v. Clay*, 1 Litt. 261; s. c. 3 A. K. Marshall, 545; *Alsberry v. Hawkins*, 9 Dana, 177); and Mississippi (*Woodriddle v. Wilkins*, 8 How. 380).

<sup>2</sup> Per O'Neill, J., 1 Hill, 201.

<sup>3</sup> 3 Dall. 133 (1795).

<sup>4</sup> 4 Hall's Am. L. J. 460; s. c. 2 Cr. 82, n. (1799).

against British commerce. Admitting the acts charged, he offered to prove that in 1792 he was naturalized in France, "renouncing his allegiance to all other countries, particularly to America, and taking an oath of allegiance to the Republic of France, all according to the laws of said republic; that, immediately after said naturalization, he was duly commissioned, by the Republic of France appointing him a second lieutenant on board a French frigate called the *Charent*; and that, before the ratification of the treaty of amity and commerce between the United States and Great Britain, he was duly commissioned by the French Republic a second lieutenant on board a seventy-four gun ship in the service of the said French Republic; and that he has ever continued under the government of the French Republic down to the present time, and most of the said time actually resident in the dominions of the French Republic; that during said period he was not resident in the United States more than six months, which was in the year 1796, when he came to this country for the purpose merely of visiting his relations and friends; that for about three years past he has been domiciled in the Island of Guadaloupe, within the dominion of the French Republic, and has made that place his fixed habitation, without any design of again returning to the United States for permanent residence." The United States District-Attorney conceded the correctness of this statement, but objected that it "could have no operation in law to justify the prisoner for committing the acts alleged against him in the indictment." Law, J., "expressed doubts as to the legal operation of the evidence," and Ellsworth, Chief Justice of the Supreme Court of the United States, said: —

"The common law of this country remains the same as it was before the Revolution. The present question is to be decided by two great principles: one is, that all the members of civil community are bound to each other by compact; the other is, that *one* of the parties to this compact cannot dissolve it by his own act. The compact between our community and its members is, that the community shall protect its members; and, on the part of the members, that they will at all times be obedient to the laws of the community, and faithful in its defence. This compact distinguishes our government from those which are founded in violence or fraud. It necessarily results that the member cannot dissolve this compact without the consent or default of the community. Default is not pretended. . . .

Consent has been argued from the acts of our government permitting the naturalization of foreigners. When a foreigner presents himself here, and proves himself to be of a good moral character, well affected to the Constitution and government of the United States, and a friend to the good order and happiness of civil society, if he has resided here the time prescribed by law, we grant him the privileges of a citizen. We do not inquire what his relation is to his own country; we have not the means of knowing, and the inquiry would be indelicate. We leave him to judge of that. If he embarrasses himself by contracting contradictory obligations, the fault and the folly are his own. But this implies no consent of the government that our own citizens should expatriate themselves. Therefore, it is my opinion that these facts which the prisoner offers to prove in his defence are totally irrelevant; they can have no operation in law."

The jury found the prisoner guilty; and the court thereupon sentenced him to pay a fine of \$1,000, and undergo four months' imprisonment. To the second indictment Williams pleaded guilty, having no defence but the right of expatriation, and received a like sentence.

In *Murray v. Schooner Charming Betsey*,<sup>1</sup> the case was this: By act of Feb. 27, 1800, Congress prohibited all commercial intercourse between "any person or persons resident within the United States, or under their protection," and France or its dependencies, and made liable to seizure and condemnation any vessel employed in such intercourse "by any person or persons resident within the United States, or any citizen or citizens thereof resident elsewhere;" and Captain Murray, of the frigate *Constellation*, having captured the *Charming Betsey*, as having cleared for a French port while owned by a citizen of the United States, a question arose as to the legality of the capture under the act. For the captors it was insisted that Jared Shattuck, owner of the schooner, was a citizen of the United States, having been born therein, and not having expatriated himself in any form prescribed by law. For the claimant it was urged that, while born in the United States, Shattuck had removed in infancy to St. Thomas, had thenceforward constantly resided there, and taken an oath of allegiance to the crown of Denmark, and was thus a Danish burgher at the time of the capture. In delivering the opinion of the court, Marshall, C. J., said: —

<sup>1</sup> 2 Cr. 64 (1804).



"Jared Shattuck, having been born within the United States, and not being proved to have expatriated himself according to any form prescribed by law, is said to remain a citizen, entitled to the benefit and subject to the disabilities imposed upon American citizens; and therefore to come expressly within the description of the act which comprehends American citizens residing elsewhere. Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law, is a question which it is not at present necessary to decide. The cases cited at bar, and the arguments drawn from the general conduct of the United States, on this interesting subject, seem completely to establish the principle that an American citizen may acquire in a foreign country the *commercial* privileges attached to his domicile, and be exempted from the operation of an act expressed in such general terms as that now under consideration."

In *McIlvaine v. Coxe's Lessee*,<sup>1</sup> the case was this: Coxe was born in New Jersey prior to July 4, 1776, and continued to reside there until some time in 1777, when he joined the British army, and ever after proclaimed himself a British subject, the laws of New Jersey at the time of his departure declaring all persons abiding therein on the 4th of October, 1776, citizens thereof, and still subjects of the State, though seduced by the enemy from their allegiance; and on this the question arose, whether Coxe was, in 1783, an alien or no. It was held "that he continued to owe allegiance to the State, notwithstanding all his attempts to throw it off."

In *United States v. Gillies*,<sup>2</sup> the case was this: By act of Congress of 1792, only a citizen of the United States could command a registered vessel of the United States; and the question was, whether Shaw, master, was such citizen, he having been born in the United States, but resident for years in England. It was held that he was still a citizen of the United States, Washington, J., saying:—

"I am yet to learn that an American citizen forfeits that character, or the privileges attached to it, by residing and marrying in a foreign country, though during a part of the time war should intervene between that and his native country, he taking no part therein; unless such character or privileges should be impaired by some law of his own country. I do not mean to moot the question of expatriation, founded on the self-will of the

<sup>1</sup> 4 Cr. 209 (1808).

<sup>2</sup> 1 Pet. C. C. 159 (1815).

citizen ; because it is entirely beside the case before the court. It may suffice for the present to say, that I must be more enlightened upon this subject than I have yet been, before I can admit that a citizen of the United States can throw off his allegiance to his country without some law authorizing him to do so. It is true that a man may obtain a foreign domicile which will impress upon him a national character for commercial purposes, and may expose his property found upon the ocean to all the consequences of his new character, in like manner as if he were in fact a subject of the government under which he resides ; but he does not, on this account, lose his original character, or cease to be a subject or citizen of the country where he was born, and to which his perpetual allegiance is due."

The case of *The Santissima Trinidad*<sup>1</sup> somewhat resembles *Talbot v. Janson*. In 1817, the Spanish ship *Santissima Trinidad* was captured by James Chaytor, sailing under a Buenos Ayres commission ; and restitution was sought, on the ground that Chaytor was a citizen of the United States, and so incapable of making good prize. Chaytor admitted that he was a native-born citizen of the United States, and that his wife and family constantly resided therein ; but alleged that in 1816 he had accepted a commission from the government of Buenos Ayres, expatriating himself at the time by the only means in his power, — namely, a formal notification of the fact to the United States consul at Buenos Ayres. Restitution was decreed ; and Story, J., in delivering the opinion of the court, said : —

"Assuming, for the purposes of argument, that an American citizen may, independently of any legislative act to this effect, throw off his own allegiance to his native country, as to which we give no opinion, it is perfectly clear that this cannot be done without a *bona fide* change of domicile under circumstances of good faith. It can never be asserted as a cover for fraud, or as a justification for the commission of a crime against the country or a violation of its laws, when this appears to be the intention of the act."

In *Inglis v. Trustees of Sailors' Snug Harbor*,<sup>2</sup> the case was this : July 4, 1776, New York became an independent State, and on the 16th of the same month declared "that all persons abiding within the State of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the State." Sept. 15, 1776, the British captured the

<sup>1</sup> 7 Wh. 283 (1822).

<sup>2</sup> 3 Pet. 99 (1830).

city of New York, and remained in possession of it up to November, 1783. Between the 4th of July and the 15th of September, 1776, John Inglis was born in the city. His father, Charles Inglis, a devoted adherent of the royal cause, resided in the city constantly from July 4, 1776, to November, 1783, when he departed with the British, taking his son; and thereafter neither ever returned to the United States. Was John Inglis an alien or no? It was held that Charles, the father, by his residence in New York at the time of the resolutions of July 16, 1776, became a citizen of New York, and John, the son, followed that nationality; but that the treaty of 1783 considered those then adhering to the crown British subjects, and those adhering to the United States American citizens; and as Charles Inglis was in the former category, he was an alien, as also his son, as a minor *sub potestate patris*. It was considered that New York, by acceding to the treaty, had consented to Charles Inglis changing his nationality. Thomson, J., delivering the opinion, saying: "It cannot, I presume, be denied but that allegiance may be dissolved by the mutual consent of the government and its citizens or subjects. The government may release the governed from their allegiance."

In *Shanks v. Dupont*,<sup>1</sup> the case was this: In 1781, Ann Scott, a citizen of South Carolina, married a British officer in that State, and in 1782 accompanied him to England, where she ever after remained. Was she, on the treaty of peace of 1783, a British subject or an American citizen? The court, Story, J., delivering the opinion, first considered whether her marriage to an alien worked a transferral of her allegiance from South Carolina to Great Britain; and held that it did not, "because marriage with an alien, whether a friend or an enemy, produces no dissolution of the native allegiance of the wife. It may change her civil rights, but it does not affect her political rights or privileges. The general doctrine is, that no person can, by any act of their own, without the consent of the government, put off their allegiance and become aliens." It is next considered whether her removal to and residence in England operated a dissolution of her allegiance to South Carolina; and held that, by virtue of the treaty of 1783, they did. That treaty the court deems an act of reciprocal absolution from allegiance by the high contracting parties. All citizens of the United States actually adhering, at the date of the

<sup>1</sup> 3 Pet. 242 (1830).

treaty, to the British crown, were absolved by the United States from their American allegiance; and, *vice versa*, Great Britain absolved from their British allegiance all subjects of the crown then actually adhering to the United States. Or, in other words, Ann Scott became absolved from her allegiance to South Carolina, not by her own act, but by the consent of that State, as manifested in the treaty. In the first edition of his commentaries, brought out before this decision, Kent says: "The better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States without the permission of government, to be declared by law; and that, as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered;" and in a note to this, brought out after the decision, he says: "This rule was admitted in *Inglis v. The Trustees of the Sailors' Snug Harbor*, 3 Pet. 99, and expressly declared in *Shanks v. Dupont*, id. 242."<sup>1</sup> In his Commentaries on the Constitution, Story, in speaking of naturalization, says:—

"A question is often discussed under this head, how far a person has a right to throw off his national allegiance and to become the subject of another country, without the consent of his native country. This is usually denominated the right of expatriation. It is beyond the purpose of these commentaries to enter into any consideration of this subject, as it does not properly belong to any constitutional inquiry. It may be stated, however, that there is no authority which has affirmatively maintained the right (unless provided for by the laws of the particular country), and there is a very strong current of reason on the other side, independent of the known practice and claims of the nations of modern Europe."<sup>2</sup>

In a note to Wheaton's International Law,<sup>3</sup> Lawrence says: "The Supreme Court, while recognizing, in common with the admiralty tribunals of England, a change of domicile for commercial purposes, have not admitted the distinct right of expatriation independently of an act of Congress to authorize it."

Opposed to this bulk of authority is the case of *Stoughton v. Taylor*.<sup>4</sup> Taylor was born a British subject; then became by naturalization a citizen of the United States; then reverted to his original British nationality; then became by naturalization a citizen of the United Provinces of South America; and, under a commission from this power, preyed upon Spanish commerce;

<sup>1</sup> 2 Com. 49.<sup>2</sup> Sect. 1104.<sup>3</sup> App. 633.<sup>4</sup> 2 Paine, C. C. 652; s. c. 3 Wheeler's Cr. Cas. 382.

a man without any country at all? The act, however, explains itself, though in a shambling sort of way. It first defines the right of expatriation as "a natural and inherent right of all people," and then proceeds to say, that "in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship." The use of the word "freely" might seem to imply that the emigrant's natural and inherent right of expatriation has been recognized at his mere volition; whereas, in truth, no alien reaching these shores has any right of expatriation, so far as the United States are concerned, save a purely statutory right. Our law says: "An alien may be admitted to become a citizen of the United States in the following manner, *and not otherwise*;"<sup>1</sup> and then prescribes the conditions wherewith the emigrant must comply before this government will recognize any right of expatriation in him, or regard him as otherwise than an alien bound in allegiance to some foreign power. He may live here fifty years, marry, rear a family, forget his native tongue, and yet his natural and inherent right of expatriation is a mere dead letter, until the statute, breathing upon it, brings it into life. There is no naturalization by implication in the United States, though "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness;" and, *e converso*, notwithstanding the same weighty considerations, there is no denationalization from the United States by inference. The citizen of the United States may, it is true, renounce his allegiance thereto, and become a citizen or subject of Austria, Sweden, Baden, Bavaria, Hesse, Württemberg, Germany, Belgium, Denmark, Mexico, or Great Britain; but this is not by virtue of any natural and inherent right which he possesses so to do, but because, in treaties with those powers, the United States have authorized such a transfer of his allegiance, and marked out the manner in which it may be made. The act of 1868, taking it to be, in the portions quoted, an act at all, is a legislative expression of opinion to the effect that the citizen of the United States ought to be allowed to absolve himself from his allegiance thereto, but in no wise gives this sentiment a practical operation; and such, accordingly, is the view taken by the President in his Message of Dec. 7, 1875, thus: "Congress

<sup>1</sup> Rev. Stats. sect. 2165.

has declared the right of expatriation to be a natural and inherent right of all people; but while many other nations have enacted laws providing what formalities shall be necessary to work a change of allegiance, the United States has enacted no provisions of law, and has in no respect marked out how and when expatriation may be accomplished by its citizens. . . . No doubt should exist on such questions, and Congress should determine by enactment of law how expatriation may be accomplished and change of citizenship be established." This is almost the precise language of Mr. Justice Paterson, in *Talbot v. Jansen*,<sup>1</sup> decided in 1795, just eighty years before: "A statute of the United States relative to expatriation is much wanted. . . . Ascertaining by positive law the manner in which expatriation may be effected, would obviate doubts, render the subject notorious and easy of apprehension, and furnish the rule of civil conduct on a very interesting point;" and the coincidence is a striking evidence of how stationary our law has remained on this subject since the inception of the government of the United States.

We may conclude, then, —

I. That the citizen of the United States, if also a citizen of a State, — for while every citizen of a State is *ipso facto* a citizen of the United States, it by no means follows that every citizen of the United States is necessarily also a citizen of a State,<sup>2</sup> — may absolve himself from his allegiance to that State and become a citizen of any other State, by ceasing to reside in the former and establishing a residence in the latter. And possibly this right of expatriation extends so far, that, by establishing a residence in a Territory, or in the District of Columbia, he may cease to be a citizen of any State, and remain simply a citizen of the United States. The right itself exists by positive law, the citizen discharging his primal allegiance to his State not by virtue of any act of his own, but by reason of the concurrent act of the State.

II. That the citizen of the United States cannot absolve himself from his allegiance thereto, — save in the treaty cases above mentioned, — there being, with the exception of those conventions, no law of the United States permitting him so to do.

It remains to add, that, in 1869, a royal commission, consisting of the Earl of Clarendon, Mr. Cardwell, Sir Robert J. Philimore,

<sup>1</sup> 3 Dall. 183.

<sup>2</sup> *Slaughter-House Cases*, 16 Wall. 36.

Baron Bramwell, Sir John Karlake, Sir Travers Twiss, Sir Roundell Palmer, Mr. Forster, Mr. Vernon Harcourt, and Mr. Montague Bernard, recommended that "Any British subject, who, being resident in a foreign country, shall be naturalized therein, and shall undertake, according to its laws, the duty of allegiance to the foreign State, as a subject or citizen thereof, should, upon such naturalization, cease to be a British subject;" and such is now the rule of English law. The sovereign licenses the subject to discharge himself of his allegiance whenever any other sovereign is willing to accept his fealty. It is not improbable that this will, in time, become the rule also of American law. The tendency seems toward a liberal extension of the right of denationalization; and the writer may here refer to one curious instance, which he is not aware has ever been mentioned, except by himself in some prior papers on this general subject of expatriation. On withdrawing from the Union, and before entering into the Southern Confederacy, the seceding States considered themselves as occupying the same position as the original States upon the Declaration of Independence, — namely, that each State was independent of the former general government and of every other State (the Florida ordinance of secession expressing the idea thus: "That the State of Florida hereby withdraws," &c., "and is hereby declared a sovereign and independent nation" <sup>1</sup>), — and, in right of this autonomy, claimed or exercised sovereign powers. Virginia entered into a convention with the provisional government of the Confederate States touching the control by the latter of the former's military power pending the accession of the State to the Confederacy;<sup>2</sup> North Carolina mooted an embargo;<sup>3</sup> and South Carolina, letters of marque and reprisal;<sup>4</sup> not to speak of creating a Secretary of War, a Secretary of the Treasury, a Secretary of the Interior, and a head of the Post-Office Department and Customs Bureau;<sup>5</sup> Georgia ordained an army and navy;<sup>6</sup> Alabama regulated customs,<sup>7</sup> vested admiralty jurisdiction in its courts,<sup>8</sup> and fixed the value of "gold and silver coin of the United States, of England, France, Spain, Mexico, and the Southern Republics;"<sup>9</sup> and Louisiana created a

<sup>1</sup> Journ. Fla. Conv. 1861, p. 99.

<sup>2</sup> Journ. Va. Conv. 1861, app. sec. sess. p. 31.

<sup>3</sup> Journ. N. C. Conv. 1861-62, p. 35.

<sup>4</sup> Journ. S. C. Conv. 1860-62, p. 142.

<sup>5</sup> Id. p. 518 *et seq.*

<sup>6</sup> Journ. Ga. Conv. 1861, p. 879.

<sup>7</sup> Ala. Ords. 1861, p. 19.

<sup>8</sup> Id. p. 22.

<sup>9</sup> Id. p. 20.

“standing army,”<sup>1</sup> and adopted “a national flag for the State of Louisiana;”<sup>2</sup> and in particular, South Carolina,<sup>3</sup> Georgia,<sup>4</sup> Alabama,<sup>5</sup> and Louisiana,<sup>6</sup> legislated in their several conventions on the subjects of allegiance and citizenship. The oath of allegiance prescribed was the same in each: “I do swear (or affirm) that I will be faithful, and true allegiance bear, to the State of —, *so long as I may continue a citizen thereof.*” The South Carolina, Georgia, and Alabama ordinances further provided, that every person then a citizen, according to the rules laid down, should remain such citizen, “unless a foreign residence shall be established by such person with the intention of expatriation;” and while the right of expatriation thus conceded was in terms confined to those who were citizens at the date of secession, it is inferable, from the wording of the oath of allegiance, that it was the legislative intent to extend that right generally to all citizens. The first actual legislation, therefore, among English-speaking people, since the expatriation statute of Virginia of 1779, looking to the abandonment of the rule, once a subject, always a subject, may be attributed to the Southern conventions of 1861. The test, however, adopted in that legislation, — namely, the establishment of a foreign residence with the intention of expatriation, — is a crude one; for, as well observed by Mr. Vernon Harcourt, of the British nationality commission of 1868, “Of all questions of law, those which concern domicile are the most complicated and obscure, because they ultimately depend upon intention, which is, necessarily, of all things the most difficult to determine.” The better principle is that of the English statute, which regards the subject as still a subject, whatever his residence or intention, until the overt and easily provable act of a foreign naturalization. Thenceforward he is an alien, except that “he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien.”

[NOTE. — In addition to the authorities above given, the reader may consult 8 Op. 189, 9 Op. 62, and opinions of the principal officers of the executive departments, and other papers relating to expatriation, naturalization, and change of allegiance. Washington: Government Printing Office. 1873.]

SALEM DUTCHER.

AUGUSTA, GA.

<sup>1</sup> Journ. La. Conv. 1861, p. 247.

<sup>2</sup> Journ. p. 764.

<sup>3</sup> Ords. p. 61.

<sup>4</sup> Id. p. 257.

<sup>5</sup> Journ. pp. 379, 386.

<sup>6</sup> Journ. p. 249.



## NOTES ON CORONERS.

THE office of coroner is of very ancient institution, — so remote, indeed, that its origin is not clearly known. It is certain that coroners existed in the time of Alfred, for that king caused to be executed a judge who sentenced a prisoner to death upon the coroner's record, without allowing him to traverse.<sup>1</sup> The office could formerly be held in England only by men of high dignity, and a statute passed in the reign of Edward I. provided that none but lawful and discreet knights should be chosen. Coke calls the chief justice of the King's Bench the chief coroner of the kingdom. As his name indicates, the coroner was originally an officer representing the Crown. His functions were those of a conservator of the peace, and in other respects of a ministerial deputy of the Crown. In the absence or incapacity of the *scyre-gerefa*, or shire-reeve (our present sheriff), who was the deputy of an earl, the coroner took his place. He once had the custody of the rolls of the pleas of the crown, from which he was called *custos placitorum coronæ*; and in the reign of Henry II. his title was *serviens regis*.

Part of his duties were fiscal, to "inquire of wrecks and royal fishes, such as whales, sturgeon, and the like." The statute<sup>2</sup> "*De officio coronatoris*" commanded him to assay all weights and measures according to established standards. The statute continues: "Also it is our pleasure, that as soon as any felony or misadventure do happen, or treasure be found unlawfully hid in the earth; or of the rape of women, of the breaking of prison, or man dangerously wounded, or of other accident happening, — the coroner immediately, upon notice, issue his mandate" to summon a jury. From which it will be seen that his functions were somewhat various.

An important branch of his duties as a fiscal officer was the forfeiture of deodands. *Omnia quæ movent ad mortem sunt deodanda*; all personal chattels, such as horses, wagons, cattle, ships, &c., which contributed to the death of any person, were sedulously pronounced "accursed things," and by a pious fraud of

<sup>1</sup> 6 Vin. Abr. 242.<sup>2</sup> 4 Edw. I.

the church were forfeited to be distributed *in pios usus*,—usually paid for masses for the benefit of the deceased's soul. Infants being deemed incapable of sin, no deodand was necessary to purchase propitiation, provided the thing were at rest and the infant fell from it; but if the thing moved to his death, then it was a deodand. Some curious distinctions arose in course of time in the construction of the law upon this portion of the king's royal revenue. When a moving carriage caused the death, both horses and carriage were forfeited; but if the deceased fell from a wheel when not in motion, the wheel only was a deodand. If a man in watering his horse were drowned, it being the fault of the animal, the horse was forfeited; but if the man were drowned by the violence of the stream, the horse would not be a deodand. Where a man fell from a ship in salt water and was drowned, no deodand was due; but if he fell from a ship or boat in fresh water, the vessel was forfeited.<sup>1</sup>

Juries soon learned, however, that when a husband and father was killed in falling from his cart, it was something of a hardship for his family, already deprived of their support, to forfeit the horses and cart in addition to their other loss, and therefore it became the custom to find that only some small portion, as the left fore-wheel of the cart, contributed to the death.<sup>2</sup> When a person was drowned in a well, the well was to be filled up.

In cases of *felo de se*, forfeitures included all goods and chattels of the suicide, and consequently became of serious importance to the surviving family. And it is in allusion to the tortuous devices resorted to by claimants to save the forfeiture that Shakespeare puts into the mouth of the grave-digger the sapient speech about Ophelia's being drowned, not by herself, but by the water. The curious student may discover the original of this "crowner's quest law" in *Hales v. Petit*,<sup>3</sup> where it is solemnly argued on one side that Sir James Hales in drowning himself had committed an act of felony during his lifetime, and, *per contra*, that the felony not being complete until death consummate, he committed none while alive, and therefore no forfeiture was due.<sup>4</sup> Finally, the coroner's duty was to take cognizance of certain pleas of the crown, and to make inquiry in cases where "any be slain or suddenly dead or wounded." He held, as it were, the court of

<sup>1</sup> 1 Hawk. P. C. c. 26, § 6.

<sup>3</sup> Plowd. 260.

<sup>2</sup> Jervis, Cor. 204.

<sup>4</sup> Wallace, Reporters, 103.

first instance ; for formerly, in England, the coroner's jury performed the function of our grand jury : their investigation was the preliminary hearing of the case, and when their verdict accused any one, the " inquisition " was the indictment upon which the accused was tried ; and accordingly the old reports contain instances of arraignment on inquisitions, traversing, and quashing. They were worded as carefully as indictments now are, and were in all respects treated as such.

These consequences now no longer result from the inquest. While the coroner in England still binds over a person inculpated by the verdict to appear at the next assizes, there is nevertheless instituted at the same time a parallel proceeding in the courts, and if an indictment is there found, the accused is tried on that alone. If the courts fail to return an indictment, however, he is still obliged to appear at the assizes, and there be discharged. In this country, the coroner's inquest has no such consequences ; indeed, it has no consequences at all. No prosecution is ever based upon it ; it is not used or referred to at the subsequent trial. And although a coroner is by statute authorized to cause the arrest of one accused by the verdict, it is only to bring him before some magistrate for examination. Practically, however, this power is very rarely invoked, as the suspected person is almost always in custody before the coroner has any knowledge of the case.

The coroner's jury is as ancient as the coroner himself. But formerly its members were the accusers or witnesses rather than the judges, and were summoned from the neighborhood as persons likely to be acquainted with the facts. They might formerly, from their own knowledge, and without having any evidence brought before them, return a verdict. Though still sworn to return a true inquisition according to their knowledge and such evidence as shall be laid before them, they are no longer witnesses ; nor, indeed, ought a juror to communicate facts within his knowledge to his fellow-jurors, unless he testifies under oath ; and the better practice in such a case is to inform the coroner before the impanelling of the jury that he desires to testify, and not to serve as a juror. If the phrase " your knowledge " in the oath has any meaning at all now, it probably has reference to such information as the jurors shall obtain from ocular inspection of the body, the premises, the instruments used, or other things brought to their attention.

Sudden deaths, not accompanied by suspicious circumstances, it was not within the coroner's province to inquire of. "The dying suddenly," says Jervis, "is not to be understood of a fever, apoplexy, or other visitation of God; and coroners ought not in such cases, nor indeed in any case, to obtrude themselves into private families for the purpose of instituting inquiry, but should wait until they are sent for by the peace officers of the place, to whom it is the duty of those in whose houses violent or unnatural deaths occur to make immediate communication. But under whatever circumstances, this authority must be exercised within the limits of a sound discretion; and unless there be reasonable ground of suspicion that the party came to his death by violent and unnatural means, there is no occasion for the interference of the coroner." The Court of King's Bench have repeatedly censured coroners for holding frequent and unnecessary inquests for the sake of enhancing their fees, where there was no reasonable probability or suspicion that the deaths occurred from violence or unnatural causes, as where bodies were washed ashore, evidently drowned by the ordinary perils of the sea. In one case, where a woman died of a fever resulting from amputation, and a coroner threatened to hold an inquest and extorted money for abstaining from it, for which offence he was sentenced to pay a fine of £100 and to imprisonment for six months, Mr. Justice Grose, in passing sentence, said that the coroner, under these circumstances, had no pretence or authority for taking any inquest at all; but, if the case warranted his so doing, he was equally criminal in having extorted money to refrain from doing his office.<sup>1</sup> And Lord Ellenborough, in *Rex v. Justices of Kent*, observed that there were many instances of coroners having exercised their office in the most vexatious and oppressive manner, by obtruding themselves into private families, to their great annoyance and discomfort, without any pretence that the deceased had died otherwise than by a natural death, which was highly illegal.<sup>2</sup>

If this is the construction of the English statute, whose words are that the coroner is to make inquiry upon such as "be slain or suddenly dead or wounded," *a fortiori*, would it apply in this country, where, as in Massachusetts, the statute authorizes inquests "upon dead bodies of such persons *only* as shall be supposed to have come to their death by violence;"<sup>3</sup> and the Revised

<sup>1</sup> 1 East, P. C. 382.

<sup>2</sup> 11 East, 229.

<sup>3</sup> Mass. G. S. 175, § 1.

Statutes, from which this provision is copied, stated further, "and not when the death is believed to have been occasioned by casualty."<sup>1</sup>

It is well known that coroners now frequently hold inquests when the death can by no possible construction be brought within the terms of the statute. But this attempt at enlarging their office and fees is by no means a new or recent device on their part. So long ago as the reign of Henry VIII. the endeavor to extend the statutes to cases of palpable misadventure, as well as of homicide, caused the legislature to enact that if a coroner should take fees for holding inquests in cases of accident, he should suffer a penalty of forty shillings for every person dead by misadventure.<sup>2</sup>

It is amusing to read now-a-days that anciently the office was of such great dignity that no coroner would condescend to be paid for serving his country; indeed, the Statute of Westminster 1, c. 10, which is an affirmation of the common law, enacted that a coroner demanding remuneration to do his duties should suffer a great forfeiture to the king;<sup>3</sup> and for not having lands and tenements sufficient in the county to maintain the state and dignity of his office,<sup>4</sup> and for being *communis mercator*,<sup>5</sup> coroners were in those days removed.

Ever since the days of Shakespeare, coroners and their proceedings have been a butt and laughing-stock. Umfreville, who wrote with devout sobriety, and was himself a coroner, is obliged to warn coroners that notice of a violent death should be received regularly from the peace officer, and to plead that it should not be secured "meanly by himself or emissaries to run or hunt after the dead, as I fear is too commonly the practice." And elsewhere he is forced sorrowfully to acknowledge that "the office itself is in despire." He wrote over a century ago; but it may be questioned whether his good advice has been followed. That this ridicule is only too well earned, countless anecdotes of coroners and their juries attest. One of the latest is the following from England, taken from a recent number of the *Medical and Surgical Journal*:—

"A drunken man struck a furious blow at his brother, and fell dead, the blow not being returned. A *post-mortem* examination was ordered, and

<sup>1</sup> Rev. Stat. c. 140, § 1.

<sup>2</sup> 1 Hen. 8, c. 7.

<sup>3</sup> 2 Inst. 176, 210.

<sup>4</sup> 2 Inst. 132.

<sup>5</sup> 2 Inst. 32.

the surgeon was able to give positive evidence that the man died of apoplexy, without a sign of personal injury. In spite of this evidence the coroner directed the jury to find a verdict of 'manslaughter,' and then delivered himself as follows: 'E. R., these twelve gentlemen have made a very careful inquiry into the death of your brother, and, considering the provocation you received, have thought it their duty to bring in a verdict of manslaughter instead of murder, and it is therefore my duty to commit you to prison on that charge; but I wish you to remember, that although you may escape the punishment of death, yet I have no doubt that in the sight of God a man who kills his brother is more guilty than one who does not.'"

These well-authenticated cases call for our pity no less than our wonder that such proceedings are allowed to continue. It is as if a demented harlequin robed in motley rags sat in state with a tinsel crown and sham sceptre, and issued his mandates of ponderous import to his imaginary subjects. Few only laugh at them, no one ever heeds them.

One of the most marvellous features about this whole matter is the good-natured forbearance and indolence with which the office and its abuses have been tolerated, without any serious attempt at their reformation or total extinction. It had been apparent for centuries that the office was practically of no use; that its functions had in course of time been absorbed by courts of justice and other agencies better fitted for their discharge, and that their continuance in the coroner was of no service to the community; that the grossest ignorance paraded itself in the anciently honored and important office; that it had grown to be a prolific source of corruption and abuse: and yet it was not until last year that the outrageous proceedings in two cases in Great Britain, and several others in this country, awakened public attention to the need and importance of a change. Once thoroughly aroused, men see the great peril and scandalous reproach to the administration of law which exist under the present system, and are, at last, fairly prepared to lay the axe at the root of the evil once and for all time.

The two cases in Great Britain well illustrate two opposite kinds of abuse which flourish under the present law, the first due to the gross ignorance and incapacity of the average coroner as a judicial investigator, the other to the officious zeal which under the claim of duty obtrudes itself upon the privacy of a mourning household, without cause or justification.

Charles Turner Bravo was a young barrister, of strong constitution and sound health, who had recently been married to a widow possessed of a handsome income. One day after dinner he was taken suddenly and violently ill, and showed all the symptoms of metallic poisoning. To the physicians who were called he resolutely denied having taken such a poison, though Mrs. Cox, a companion of his wife, afterwards told them that he had confessed to her that he had taken it, and implored her not to tell his wife. In the course of the next day he died. Chemical analysis of the vomited food and of the contents of the intestines conclusively proved it to be a case of poisoning by tartar emetic. At his last meal Mr. Bravo had partaken of all the food in common with his wife and Mrs. Cox. The only thing which he alone had used was a bottle of Burgundy.

The resolute denial of the deceased *in extremis* to his physicians that he had taken poison, although informed in the most solemn terms by Sir William Gull that the consequences of his denial might be to throw suspicion on some one else, and the apparent absence of motive for an act of self-destruction, occasioned doubt as to his having committed suicide. The coroner, however, adopting from the first the theory of suicide, heard only a portion of the testimony. No examination was suggested of the wine remaining in the bottle, nor was it accounted for; no inquiry was made as to where the tartar emetic was procured; the wife of the deceased was not examined; and the coroner positively declined to examine one of the physicians who had been in attendance, and who offered to testify.

The necessary result of this perfunctory proceeding was a verdict that the deceased died from the effects of antimonial poison, but how or by whom the poison was administered there was no evidence to show. In other words, the only fact found by the verdict was that which the medical inquiry satisfactorily established, that the death had resulted from poison; and the only purpose for which an inquest is ever justifiable, — to ascertain whether a crime had been committed or not, was left wholly out of sight.

Certain suspicious circumstances in the case and the position taken by the medical gentlemen in attendance on the deceased caused the whole matter to become notorious; and such was the public indignation aroused by this palpable farce and miscarriage

of justice, that the attention of the government was drawn to the case. The Attorney-General moved the Court of Queen's Bench to quash the inquisition, and have a special commission appointed to hold another inquest. The Solicitors of the Treasury were set at work upon the case, and after many weeks of a most searching and careful investigation, during which all manner of collateral inquiry was indulged in, attended on both sides by eminent counsel, the second verdict was returned to the effect that Mr. Bravo did not commit suicide; that he did not die by misadventure; that he was wilfully murdered by having tartar emetic administered to him, but that there was not sufficient evidence to fix the guilt upon any person or persons. If a crime was here committed, the failure of the coroner to inquire into facts clearly connected with the death — such as examining the contents of the bottle from which Mr. Bravo alone had partaken at his last meal — probably defeated the ends of justice; if it was not a case of crime, but of suicide or accident, the hurried and slipshod manner in which the first inquiry was conducted aroused a painful suspicion, and occasioned a long and expensive, and, as it proved, fruitless investigation. In either view of the matter, proper care and a decent regard for the important interests involved would have insured the utmost care at the first hearing, and obviated the needless and scandalous second inquest.

Sir Charles Lyell, the eminent geologist, died after a lingering illness, resulting mainly from his advanced age. Some time previous to his death he had stumbled on the staircase, and fallen in such a manner as to inflict some injury, which probably, in his already weak state, hastened his decease. He had been attended by eminent physicians, who regularly certified the cause of his death. The body, encased in a leaden coffin and an oaken box surrounding it, was lying in his house ready for interment. At this moment Coroner Hardwicke, stimulated by an over-zealous officiousness, obtained admittance to the house, and declared his intention to hold an inquest. Though remonstrated with, and fully informed that there was nothing in the facts calling for such a proceeding, he insisted upon holding the inquest, and, it is said, with his own hands aided in tearing open the oaken box and the leaden casket, and thereupon proceeded to view the body. This was too much for even tradition-loving England, and such a storm arose in consequence of this



outrage, that even the previous good character and entirely blameless life of Dr. Hardwicke did not save him from most severe condemnation. Unless verbal changes have occurred in the statutes on the subject, it will be seen that this case comes directly within the principle laid down in the case above cited.<sup>1</sup>

In Prussia, Austria, France, and other countries of Europe, the coroner is unknown. In France the Procureur, the prosecuting officer, proceeds to the place where a crime has been committed, and makes the investigation. He has the power to summon witnesses and take their testimony in writing, which is read to and signed by them; to prevent egress from the house or departure from the neighborhood, when he deems it necessary; and to seize all papers and other articles supposed to be connected with the crime. He is authorized to take with him to the place of the crime one or two persons deemed by their art or profession capable of appreciating the nature and circumstances of the crime, and, where a violent or suspicious death is the subject of inquiry, he is aided by one or two health officers, always physicians, who are to report on the causes of death and the condition of the body. He is the person subsequently charged with the prosecution of the criminal.<sup>2</sup> In Austria this function likewise devolves upon the public prosecutor.

In Prussia the judge of first instance, assisted by a surgeon, an actuary, and two officers of the court, makes the investigation. The procedure there is as well by hearing testimony for and against the accused as by repeatedly questioning the accused with a view to obtaining a confession.<sup>3</sup> In Scotland, though the name of "crownor" is still known, a Procurator Fiscal, corresponding to the Procureur of France, performs the duties of the first investigation. None of these countries have a jury on the preliminary examination.

Cogent reasons in favor of these systems exist, and in some of the late discussions in England the Scotch method has been strongly advocated. Certainly the practice in these countries is more logical and reasonable than that of England and our country. Laying aside for a moment the traditional and historical associations of the office, in our day *the sole purpose of the coroner's office is the detection of crime*. That is a subject-matter for legal inquiry. But

<sup>1</sup> 1 East, P. C. 382.

<sup>2</sup> Teulet, Les Codes 1860.

<sup>3</sup> Mittermayer's Feuerbach's Lehrbuch.

a portion of that inquiry, where a dead body is found, is necessarily, first, to determine whether a homicide has been committed at all, or whether the death is in the ordinary course of nature. This feature is clearly matter for medical science, to be decided upon an inspection and examination of the body. The fact that a homicide has been committed being established, the only remaining question is, how and by whom was it done. This involves the testimony of witnesses to external facts, and the taking of testimony is a judicial duty. Until crime is suspected, the question is medical; the moment crime is suspected, it is wholly legal. What the crime is under the law; whether the manner and circumstances of its commission constitute one degree or another; what testimony is admissible and properly bears upon the issue,—these are all legal questions, unmixed with medicine. Nothing can be more logical than to impose the duty of making this inquiry upon the ordinary agencies intrusted with the discharge of judicial functions. In England and our own country we do intrust all subsequent steps in the conduct of the criminal cause to the judicial tribunals. Indeed, we employ the tribunal of last resort and the highest law officer of the State to conduct it. We guard with the utmost care the rights of the accused, by allowing him the right of challenge, the assistance of counsel, and the process of the State to compel the attendance of witnesses. In these later stages we are duly conscious of the grave trust committed to our charge. But in the earliest and often most important part of the inquiry, when the deed and its traces are fresh, we commit the care of the case involving the life of a fellow-being and the welfare of the State, to an officer not attached to the courts, and forming no part of the judicial system, generally not even a lawyer, much less skilled in the delicate and intricate questions that may and must arise in every such inquiry. And this is done in England and here, not upon any logical ground or for any valid reason, but from a blind reverence for tradition and antiquity, and in spite of all reason, logic, and common prudence. No one of us would think of committing his private affairs to a person wholly unskilled; and yet, as States, we lazily follow the old beaten track, suitable enough for a time when a single officer was intrusted with the greatest variety and diversity of duties, and for an age when a verdict of “died by the visitation of God” was all-sufficient to

account for what want of perseverance and skill failed to discover.

The most potent word as yet spoken on this subject in Great Britain is the admirable address of Mr. Herschell, before the Social Science Congress at Liverpool, in which he shows clearly the folly and danger of the present system, and advocates the establishment of a mixed tribunal, consisting of one medical man and one or two lawyers, to conduct these preliminary examinations.

The coroner's jury, it is agreed on both sides of the water, is a wholly useless and somewhat objectionable body. In the first place, the manner of their selection in this country by a constable is not calculated to produce good material; and, in fact, the ignorance and worthlessness of this body in point of character and intellect are proverbial. But when, in addition, it is remembered that they add nothing to the value or efficacy of the proceeding; that any intelligent professional man can reach a correct result more easily and much sooner unimpeded by twelve or six uninformed men than with them; that, so far as any results flow from their work, it is altogether useless, *nothing whatever* being done with a verdict after it is found, as it is neither the basis of, nor any assistance in, any later proceeding, and the criminal courts proceed wholly without respect or reference to it; that it protects no one, as there is at that stage no one accused; that, therefore, it is no safeguard, and that in the slow, cumbersome process before it much precious time is lost, often to the detriment of justice; when, finally, it is considered that the publicity of the proceedings, the loose and vague manner of conducting them, and the vast mass of irrelevant and often highly improper matter which the coroner, ignorant of the rules governing the admission of valid evidence, suffers to be dragged into the case, tend directly to thwart justice, and, in our age of eager reporting, manifestly to demoralize and corrupt the public mind, — it is not apparent what benefits we derive from a further retention of the jury. They aid in nothing, they retard and endanger much, and are a great expense.

In England, and in New York and several other of the United States, coroners are elected. In Massachusetts they are appointed by the governor and council. In Connecticut the office does not exist, a constable performing its duties.

The grave and responsible powers lodged in the hands of an

officer, combining in his person the function of a medical expert, a witness, and a judge, are sufficiently apparent to make us watchful of their further abuse. The uselessness of their present procedure, compared with the truly valuable results to the cause of public health and safety which would follow a scientific distribution of their incongruous functions, is a sufficient warrant for abolishing the office as at present constituted, and dividing its duties between the professions respectively fitted for their discharge.

The coroner now exercises his choice in calling in a medical man to make the examination and autopsy. In the absence of sufficient legislation to prevent untrained persons from practising medicine, this method of carrying on the examination is no guarantee of special fitness, and is calculated to inspire distrust.

The medical officer should be a permanent appointed official, of high character and standing, whose duty it should be to make the preliminary examination of a dead body, and decide whether the death was violent or natural. In the former case, he should at once notify a judicial officer, who should thenceforth take charge of the examination, leaving for the physician no other duty than that of testifying at the subsequent trial. The vast excess of inquests held over all reported statistics of crime is a strong indication that the existing coroners are very deficient in medical knowledge. In Boston, during the last fiscal year there were held four hundred and twenty-three views and one hundred and ten inquests. In Manchester, during the years 1863-1873 there were three thousand five hundred and five inquests held, in which the jury found that the parties had died "from natural causes." This monstrous number of apparently needless inquests caused the Watch Committee to report the fact to the City Council. Not only would this abuse be prevented by the appointment of competent and reputable medical men, who, by an intelligent examination, would in most cases be able to decide at once that the death was natural, and no further investigation needful, but their records would furnish a valuable contribution to the literature of medico-legal science.

On whom the remaining duty of taking the testimony and determining the law should devolve, is a question upon which there may be different opinions. Should the district attorney who has charge of the later conduct of the case officiate? Should it

be a justice of some court? In favor of the first proposition, it may be said that since it is merely an inquiry into the facts and not a trial, and since the district attorney is the person who most needs the information subsequently, we may in that respect adopt the prevailing practice of continental states in Europe. Moreover, as an accusation is often as ruinous to a reputation as actual proof of guilt, there is this advantage also in the Scotch system, that the inquiry is carried on quietly until some ground for open action exists. A case which illustrates the benefits of this system is that of a Scotch physician, who, being annoyed by the settlement and popularity of a quack near him, instituted proceedings against him under the Medical Practitioners' Act. The quack thereupon notified the Procurator Fiscal that a patient of the doctor's had died in consequence of malpractice. The remains were disinterred, and furnished positive proof that the charge was false. A public inquest, whether inculcating or exonerating the physician, would certainly have proved his ruin, especially if, as might have been the case in Massachusetts, the quack himself had been the coroner who instituted and conducted it. The same advantage would be secured, however, in a proceeding before a justice of some court where only material evidence would be admitted, and the mass of incompetent and pernicious matter that is always brought out before a coroner would be wholly excluded.

But one consideration seems to be decisive against this proposition: our system of criminal prosecution is at variance with that of the countries where this practice prevails, and the very fact that with us a neutral body intervenes between the prosecutor and the accused, which, by a perfectly well-established law of human action, necessarily heightens the zeal of the prosecutor, must for ever prevent us from uniting the prosecutor and judge in one person. Every person familiar with the administration of criminal law knows the tendency of a prosecutor to consider every accused person guilty. Our judiciary wisely recognize this in assigning the various justices by turn to preside over criminal trials, instead of appointing one permanent criminal judge.

Judicial functions must not be intrusted to a partisan; and a public prosecuting attorney represents the State, which is a party. A judge must be the unbiassed guardian of the interests of both parties, — of the accused no less than the State. The

danger just pointed out was forcibly illustrated at the second inquest in the Bravo case, where Mr. Serjeant Parry felt compelled to remonstrate against the evident purpose of the Crown counsel to fasten guilt upon three certain persons.

On the other hand, there seems to be no good reason why the preliminary processes of a criminal investigation should not be intrusted to the agencies charged with its subsequent conduct. As previously mentioned, the criminal courts of first instance, before binding over a suspected person, are obliged to hear the whole testimony *de novo*, unless the prisoner chooses to waive the examination. And the only difference between this examination and that carried on before a coroner is, that in the court there is an accusation, whereas before the coroner there is as yet none. The coroner's proceeding, therefore, has the one advantage over the court's, that witnesses can be summoned and compelled to testify before any prosecution is instituted. But nothing can be simpler than to transfer this right also to the courts. As the hearings before the coroner are, after the view, held out of sight of the body and remote from the place of the crime, the evidence being brought together by police-officers mainly, it seems equally feasible to conduct the hearing in a court-room, especially as the proposed change, giving the physical examination wholly into the hands of responsible medical men, makes it unnecessary for the judge to view the body.

The district attorney, being the public prosecutor, should have charge of the search for the facts, and, when gathered, should lay them before the magistrate, who, without a jury, should make a report of his finding, and, if he finds cause therefor, should thereupon institute the prosecution.

The proposed changes, therefore, are : —

1. The abolition of the coroner's jury.
2. The abolition of the office of coroner as at present constituted, and the division of the coroner's functions between —
  - a. Medical officers to make the physical examination and testify to its results.
  - b. Judicial officers to hear the testimony and apply the law.
3. The appointment of permanent medical officers of high character and standing for the former duty.
4. The transfer of the latter duty to the courts of first instance or the committing magistrates.

THEODORE H. TYNDALE.

## DIGEST OF THE ENGLISH LAW REPORTS FOR NOVEMBER AND DECEMBER, 1876, AND JANUARY, 1877.

ACCELERATION. — See REMAINDER, 1.

ACCOMMODATION BILL. — See BILLS AND NOTES, 3, 4.

ACCUMULATION. — See DEVISE, 2.

### ACT OF GOD.

The defendant owned land upon which had been built embankments for the purpose of damming up a natural stream which ran through the land, thereby forming large pools. A storm occurred, accompanied with rain, heavier than ever known to have taken place there previously; and in consequence the stream was so swelled that it carried away the plaintiff's bridges. The jury found that there was no negligence in the construction or maintenance of the embankments, and that the storm was of such violence as to constitute the cause of the accident *vis major*. Held, that the defendant was not liable for the damage. — *Nichols v. Marstand*, 2 Ex. D. 1; s. c. L. R. 10 Ex. 255; 10 Am. Law Rev. 286.

ADEMPTION. — See SETTLEMENT, 3.

ADVOWSON. — See TRUST, 1.

### AMALGAMATION.

D. purchased an annuity in the R. company, which was empowered by its deed of settlement to make over its business to another company. By the policy, the stocks and funds of the company were during the life of D. to be subject and liable to pay D. said annuity; but no reference was made to said deed of settlement or to the company's power to transfer its business as aforesaid. Said company transferred its business to the E. company, and both companies were subsequently wound up. Held, that D. could only prove against the E. company. — *Dowse's Case*, 3 Ch. D. 384.

ANCIENT LIGHTS. — See PRESCRIPTION.

### ANNUITY.

1. A testator bequeathed his residuary estate to trustees in trust to purchase thereout from government an annuity for M. for life; and he directed that M. should not be entitled to elect to receive the price or value of said annuity in lieu of it, and he declared that the annuity was given for the sole and separate benefit and disposal of M., and that if M. should at any time sell, alien, assign, transfer, incumber, or in any wise dispose of or anticipate the annuity, it should thereupon cease, be void, and sink into the residue of the testator's estate. Held, that M. was not entitled to such sum as would purchase said annuity; but that said trustees should purchase an annuity for M. to be paid to her for life or until she should alien it. — *Hatton v. May*, 3 Ch. D. 148.

2. A testator gave an annuity to E. for life, and after her death to her children during their lives, and after the decease of the survivor to the testator's nephew and two nieces, equally between them. E. died without having had children. *Held*, that the gift to the nephew and nieces was not void for remoteness; and that the nephew and nieces were absolutely entitled to a principal sum which would produce said annuity. — *Evans v. Walker*, 3 Ch. D. 211.

3. A testatrix bequeathed stock to trustees to be laid out in an annuity for H. for life, and she directed that H. should not be entitled to have the value of his annuity in lieu thereof, and that if he should sell, mortgage, pledge, or anticipate his annuity, the same should cease and form part of the testatrix's residuary estate. *Held*, that H. was absolutely entitled to the annuity and could sell it. — *Hunt-Foulston v. Furber*, 3 Ch. D. 285.

See AMALGAMATION; PRIORITY, 2.

#### APPOINTMENT.

1. By marriage settlement, personal property was assigned to trustees upon trust to pay the income to the wife to her separate use for life; and after her decease, in case the husband should survive, to pay him so much of the income as the wife should by deed or will appoint for his life; and subject thereto the trustees to hold the property for children of the marriage; and in case there should be no children (which event happened) to trustees to hold the property in trust, in case the wife should survive the husband, for the wife, her executors, administrators, and assigns, absolutely, for her sole and separate use. The wife executed a will during her husband's lifetime, in which she exercised her power of appointment; and she survived her husband without having had children. *Held*, that the will was a valid exercise of her power of appointment. Under the settlement the wife had the whole estate in the property to her separate use, and could therefore dispose of the property by her will; and her will made during coverture did not require re-execution after the husband's death. — *Bishop v. Wall*, 3 Ch. D. 194.

2. Under a marriage settlement, E. had a power of appointment among his children over certain funds in the hands of trustees. The trustees lent said funds, amounting to £6,000, to E., upon mortgage of E.'s farm. Many years later, E. in order to dispose of his property in favor of his two sons, executed three deeds of even date. By the first, to which both his sons were parties, E. settled said farm on his elder son for life, remainder to such son's children as he should appoint, and in default of appointment to all such son's children as tenants in common, remainder in default of such children to E. and his heirs. By the second deed, E. appointed said £6,000 to his elder son absolutely; and E. and said son and the trustees released said farm, freed from the mortgage, to a trustee to the uses of said first deed. By the third deed, E. gave the residue of his property to his second son. By his will, bearing the same date, E. confirmed said deeds; and referring to the contingency upon which, under said first deed, said farm was limited to himself and his heirs, he declared that upon the happening of such contingency said farm should be charged with £3,000 in favor of his daughter, and subject thereto should belong to his second son. E. died, and his daughter filed a bill against her



two brothers, alleging that E's appointment was made, not for the benefit of his elder son, but with the object of relieving his farm from the payment of said £6,000, and was therefore fraudulent and void; and that she was entitled to one-third of said £6,000. *Held*, that it did not appear that E. had made said deeds with corrupt or improper intention; that his disposition of said £6,000 under his power was not so improper as to be void if there were no fraudulent intent; and that although E., if he had not become a party to said deed, might have claimed the benefit of the appointment in his favor, free from the condition that he should release said farm from said charge, yet having signed the deeds he was bound by the condition. — *Roach v. Trood*, 3 Ch. D. 429.

3. M. had the power of appointment over a fund among her children, and in default of appointment the fund was to go to her children in equal shares. M. appointed that trustees should stand possessed of the whole of said fund in trust to pay the income of £1,200, part of the fund, to M's son J. for life, and after his death in trust for all the children of J. equally. And in case J. should die without children, then said £1,200 "to be added to and form part of the residue" of her trust estate. The residue of said fund M. appointed upon certain trusts for her daughters. J. died, leaving children. It was admitted that the appointment to J.'s children was beyond M.'s power and void. • *Held*, that upon J.'s death said £1,200 fell into the residue of M.'s estate, and was included in the appointment in trust for M's daughters. — *In re Meredith's Trusts*, 3 Ch. D. 757.

4. Legacy to V., the testatrix's daughter for life, and after her death "to and amongst my other children or their issue in such parts, shares, and proportions, manner and form, as V. shall by deed or will appoint." The testatrix left three children besides V. *Held*, that V. had the right to appoint in favor of one of the testatrix's other children, and that said power was exclusive. — *In re Veale's Trusts*, 4 Ch. D. 61.

See SETTLEMENT, 1, 7.

APPROPRIATION OF PAYMENTS. — See BILL OF LADING; BILLS AND NOTES, 1; ESTOPPEL, 1.

ATTORNEY'S LIEN. — See LIEN, 1.

BANK. — See BILLS AND NOTES, 5; PARTNERSHIP.

BANKRUPTCY. — See HOTEL-KEEPER; PARTNERSHIP; SETTLEMENT, 6.

BEQUEST. — See ANNUITY, 1, 2; APPOINTMENT, 3; CHARITY; CONTINGENT REMAINDER; DIVORCE; ELECTION; ILLEGITIMATE CHILDREN; LEGACY; PARTNERSHIP; PRIORITY, 2; REMAINDER; SETTLEMENT, 3; TRUST, 3; WILL.

#### BILL OF LADING.

In order to enable L. to purchase produce to be shipped to the plaintiff, the plaintiff agreed to allow L. to draw upon him, upon L's agreeing to hypothecate the documents of title in the cargo to the plaintiff, so as to enable him to obtain funds to meet the bills. L. accordingly drew upon the plaintiff, and purchased a cargo, which he shipped upon a vessel chartered by the plaintiff's vendees. A bill of lading was signed and handed to L., who on the next day became bankrupt. The liquidator sent the bill of lading to the defend-

ants with instructions not to part with it until the value of the cargo was paid to them. *Held*, that the plaintiff had an equitable right to the bill of lading, and to sue the defendants for improperly withholding it. — *Lutscher v. The Comptoir d'Escompte de Paris*, 1 Q. B. D. 709.

See **BILLS AND NOTES**, 1.

#### BILLS AND NOTES.

1. E. in London ordered cotton of A. in Bombay, and A. accordingly sent the cotton with bill of lading to his correspondent in London, together with a bill of exchange drawn on E, containing the direction that the amount of the bill should be placed to "account cotton shipments as advised." E. accepted the bill, received the bill of lading, and raised money upon it from C., who subsequently sold the cotton. E. failed. A. claimed the proceeds of the cotton as having been specifically appropriated to the payment of the bill of exchange. *Held*, that there was no such specific appropriation. — *In re Entwistle. Ex parte Arbuthnot*, 3 Ch. D. 477.

2. By agreement between brewers and an ale merchant, the latter was to be allowed 20 per cent discount on the invoice price of ale sold to him on payment in cash within one month. The merchant, on purchasing ale of the brewers, gave them certain bills of exchange drawn by the brewers upon the merchant and accepted by him. The bills were not paid at maturity. *Held*, that the bills were not payment, as they were dishonored at maturity, and that the merchant was not entitled to said discount. — *In re Cumberland. Ex parte Worthington*, 3 Ch. D. 803.

3. Action on a bill of exchange by an indorsee against an indorser. Defence, want of notice of dishonor. Reply, that neither drawer, acceptor, nor any indorser prior to the defendant had at any time any effects of the defendant in his hands; and that the bill was drawn, accepted, and indorsed by the defendant and prior indorsers, for the purpose of raising money for the defendant, the drawer, and the acceptor, and the persons who indorsed before the defendant, jointly; and the defendant was in no way damnified, even if there was no notice of dishonor. Demurrer sustained. — *Foster v. Parker*, 2 C. P. D. 18.

4. In an action against an indorser of a bill of exchange, the indorser set forth in his defence that the bill was an accommodation bill, drawn, accepted, and indorsed to enable another indorser to raise money upon it, and that such other indorser had promised to meet the bill, but had failed to do so, and that the said indorser, the defendant, had never received notice of the dishonor of the bill. *Held*, that the defendant was entitled to notice of dishonor of said bill. — *Turner v. Samson*, 2 Q. B. D. 23.

5. M. bought on Feb. 11 from L. drafts by L. upon a Cadiz merchant. By custom of the London money market such bills are paid for upon the first post-day after their purchase, which in this case was Feb. 14. On Feb. 12, L. was pressed by his bankers to reduce the debt he owed them, and accordingly on Feb. 14 gave them an order requesting M. to pay them the amount of said drafts. On Feb. 14, M. gave said bankers his check for the amount of said drafts, and the bankers delivered to M. the said order of L. on M. On the same day, L. failed, whereupon M. stopped payment of the check he had given to said

bankers. *Held*, that the bankers were entitled to recover from M. the amount of his check. — *Misa v. Currie*, 1 App. Cas. 554.

BROKER. — See INSURANCE, 2.

CALLS. — See WILL, 2.

CARRIER. — See ESTOPPEL.

#### CHARITY.

A testator directed that certain funds, over which he had power of appointment, should, unless otherwise specifically disposed of by a codicil to his will, become part of his residuary estate. By a codicil, the testator gave legacies out of said funds to certain societies, and the residue he directed to be given to such charitable institutions as he should by any future codicil direct, and, in default thereof, to be distributed by his executors at their discretion. The testator made no further codicil. *Held*, that the gift of the residue was to be distributed among charitable institutions as the executor should direct. — *Pocock v. Attorney-General*, 3 Ch. D. 342.

CHARGE. — See PRIORITY, 2.

#### CHARTERPARTY.

1. Ship-owners at Copenhagen shipped a cargo of timber to Liverpool, "for discharging the whole cargo at Liverpool, five days." The vessel arrived at Liverpool Sept. 12, and got into the dock to which she was ordered on the 13th, but by reason of the crowded state of the dock could not get a berth at the quay, where the unloading was by the regulations of the dock to take place, until the 17th; and she began unloading on the 18th, and finished on the 23d. The plaintiff offered to show that, by the custom of Liverpool in the case of timber ships, the lay-days began only from the mooring of the vessel at the quay, where alone she was allowed to discharge, and not from the time of her entering the dock. *Held*, that the evidence of said custom was admissible, although one of the parties to the contract of shipment was a foreigner: it had not the effect of varying the terms of a charterparty. — *Norden Steam Co. v. Dempsey*, 1 C. P. D. 654.

2. Under a charterparty, a vessel was to carry a cargo to a good and safe port in the United Kingdom, calling at Queenstown for orders which were to be forwarded in forty-eight hours, specifying such port. It was agreed that the liability of the charterers should cease as soon as the cargo was on board; provided the same was worth the freight at the port of discharge, but the owners to have an absolute lien on the cargo for all freight, dead freight, and demurrage. The owners brought an action on the charterparty, alleging that the charterers, the defendants, failed to give orders as to said vessel's port of discharge; and also that the charterers gave orders for discharge at a port which was not good and safe within the meaning of said charterparty. Demurrer. *Held*, that, under the charter, the charterers were absolved from liability on account of the alleged breaches of the charter, whether a lien for damages was caused thereby or not. — *French v. Gerber*, 1 C. P. D. 737.

CHECK. — See BILLS AND NOTES, 5.

CHILD EN VENTRE SA MERE. — See LEGACY, 1.

CLASS. — See LEGACY, 1, 8; PERPETUITY.

CODICIL. — See WILL, 1.

COLONIES, ENGLISH. — See LIMITATIONS, STATUTE OF.

COMMON CARRIER. — See CARRIER.

#### COMPANY.

A single shareholder cannot constitute a "meeting" of a company under 32 and 33 Vict. c. 19, § 4. — *Sharp v. Dawes*, 2 Q. B. D. 26.

See AMALGAMATION; JUDGMENT; WILL, 2.

CONDITION. — See ANNUITY, 1; APPOINTMENT, 2; VENDOR AND PURCHASER, 1.

CONFIRMATION. — See SETTLEMENT, 1.

CONSTRUCTION. — See ANNUITY; APPOINTMENT; CHARITY; CHARTER-PARTY; CONTINGENT REMAINDER; DEVISE; ILLEGITIMATE CHILDREN; INSURANCE, 2, 3; LEGACY; MORTGAGE, 1; PERPETUITY; REMAINDER; SETTLEMENT, 4, 5; STATUTE; TRUST; WILL, 2.

#### CONTINGENT REMAINDER.

A testator devised one moiety of his real estate to two trustees and their heirs, "to the several uses and upon the several trusts, and for the several ends, intents, and purposes thereafter declared," for the term of one hundred and twenty years next after his decease, if S. should so long live, and after the expiration of said term, and in the mean time subject thereto to the use of J., the husband of S., for life, with remainder to the use of said trustees during the life of J., to preserve contingent remainders, remainder to the use of all the children of S. living at her decease, as J. and S. should appoint, and in default of appointment to the use of all the children of S. living at the decease of the survivor of J. and S., and the issue of such of them as should be then dead, leaving issue then living, such issue to take their parent's share as tenants in common, with divers remainders over. The trustees were authorized to "convey in exchange" the devised property, and to convey "in fee-simple upon partition" any of the testator's undivided shares in property, and for such purposes to revoke the aforesaid trusts, and to grant and convey the premises whereof the uses should be revoked to such person and to such uses as should be necessary, or to declare such uses, estates, or trusts of the premises as should be necessary. The other moiety was devised upon like trusts for other parties. J. died, leaving his wife S. surviving; and two years later S. died, leaving children. *Held*, that there was no legal estate in the trustees to support the contingent remainder in the children of S. during the period between the death of J. and the death of S. — *Cunliffe v. Braucker*, 3 Ch. D. 393.

See REMAINDER, 2; SETTLEMENT, 5.

CONTRACT. — See BILL OF LADING; BILLS AND NOTES, 2; CHARTERPARTY; FRAUDS, STATUTE OF; INSURANCE; PRINCIPAL AND SURETY.

#### COVENANT.

The vendee of a piece of land adjoining other land of the vendor, covenanted

to erect a pump and reservoir, and supply water from a well on the vendee's land to houses on the vendor's land. *Held*, that a purchaser of said land from said vendee, with notice of said covenant, was bound by it; and that the court would enforce the performance of the covenant indirectly by making such an order that the purchaser of said land would be guilty of contempt if he did not supply water according to said covenant. — *Cooke v. Chilcott*, 3 Ch. D. 694.

See MORTGAGE, 1; SETTLEMENT, 5.

CUMULATIVE LEGACY. — See WILL, 1.

CUSTOM. — See CHARTERPARTY, 1; INSURANCE, 2; NEGOTIABLE INSTRUMENT.

CY-PRÈS. — See CHARITY.

DAMAGES. — See RELEASE OF DAMAGES.

DEBENTURE. — See JUDGMENT; PRIORITY, 1.

DEED. — See RELEASE OF DAMAGES.

DEMURRAGE. — See CHARTERPARTY, 1.

#### DEVISE.

1. A testator devised "my property which is not under settlement as follows;" and after specific pecuniary legacies gave "the rest and residue of my unsettled property" to A. The testator held certain copyholds as trustee. *Held*, that the copyholds passed under the devise. — *In re Brown and Sibby's Contract*, 3 Ch. D. 156.

2. A testator gave his real and personal estate to trustees upon trust to accumulate rents for twenty-one years, and, at the expiration thereof, in trust for the second and every other younger son successively of W. in tail male, and, failing such issue, in trust for the first and every other son of H., in tail male; limitations over. At the expiration of said term, H. and W. were both living, and each had one son only. *Held*, that until it should be ascertained whether W. would have a second son, the rents of the real estate went to the heir-at-law, and the income of the personal estate went to the next of kin. — *Wade-Gerry v. Handley*, 3 Ch. D. 374.

3. Devise to E. and her heirs; but, if E. should die without leaving issue living at her death, then upon E.'s death to "the nine children of A., to be equally divided among them." The residuary estate was devised to P. E. died without leaving issue; and only one of said nine children survived E. *Held*, that the surviving child of A. took a tenancy for life only, subject to which the estate passed to E. and her heirs. — *Gatenby v. Moryan*, 1 Q. B. D. 685.

See ANNUITY, 1, 2; APPOINTMENT, 3; CHARITY; CONTINGENT REMAINDER; ELECTION; ILLEGITIMATE CHILDREN; LEGACY; PERPETUITY; PRIORITY, 2; REMAINDER; SETTLEMENT, 1, 3; TRUST, 3; WILL.

#### DISCOVERY.

Ship-owners who had shipped goods bearing counterfeits of the plaintiff's trade-mark were ordered to discover the name of the consignor, in aid of proceedings to be taken against such consignor. — *Orr v. Diaper*, 4 Ch. D. 92.

## DOMICILE.

"A man having acquired a domicile of choice may abandon it, without it being incumbent on him to acquire a new domicile of choice; that is to say, he may abandon his domicile of choice without acquiring, in strictness, any new domicile; because his domicile of origin reverts." *Jessel, M. R., in King v. Foxwell*, 3 Ch. D. 518.

DOWER. — See PRIORITY, 2.

EASEMENT. — See GRANT; PRESCRIPTION.

## ELECTION.

A testator who was entitled under a settlement to a life-estate in certain cottages devised all his real estate to his wife for life, and after her death he devised said cottages to R. in fee. On the testator's death, his wife who survived him became absolutely entitled to said cottages under said settlement. R., in ignorance of said settlement, sold his supposed reversionary interest to the plaintiff. After the wife's death, the plaintiff first ascertained that the wife had sold the cottages to a purchaser without notice of said devise in the testator's will; and the plaintiff claimed compensation from her estate. *Held*, that the wife had elected to take said cottages against said will, and must make compensation to the plaintiff for the loss he had sustained by not getting possession of said cottages at the death of the widow, to the extent of the benefit she, the wife, received under said will. — *Rogers v. Jones*, 3 Ch. D. 688.

EN VENTRE SA MERE. — See LEGACY, 1.

EQUITY. — See BILL OF LADING; DISCOVERY; GRANT; JURISDICTION; LAW, MISTAKE OF; RELEASE OF DAMAGES.

## ESTOPPEL.

1. W., who had intrusted £7,700 to P. for investment, was informed by P.'s clerk that P. proposed to lend the money upon security of leaseholds at Camden. P. subsequently wrote to W., stating that said sum had been put on mortgage as arranged by his clerk with W. P. died; and it was found that no mortgage existed in favor of W., but that leaseholds at Camden were mortgaged to P. to secure £100,000. *Held*, that P. and those claiming under him were estopped from denying that said £7,700 formed part of said £100,000, and that it must be paid to W. from the larger sum. — *Middleton v. Pollock. Ex parte Wetherall*, 4 Ch. D. 49.

2. A railway company carried certain pictures to a station where they were loaded in a van to be forwarded to their destination. There a man, falsely representing himself as in the employ of M. who carried for the company, obtained from the company's delivery clerk a pass enabling him to drive the van from the company's yard and steal the pictures. *Held*, that the company was not estopped from denying that the thief was their servant. — *Way v. Great Eastern Railway Co.*, 1 Q. B. D. 692.

## EVIDENCE.

1. The defendant was licensed by the plaintiff to make certain machines of which the plaintiff held the patent. The defendant made machines, but con-

tended that they were not within said patent, on the ground that if the patent were construed so as to cover the machines he had made, it would be void for want of novelty; and in proof of this he offered in evidence certain specifications of American patents which were to be found in the English Patent Office Library, but which were not known of by the plaintiff. *Held*, that the evidence was inadmissible. — *Adie v. Clark*, 3 Ch. D. 134.

2. In the private account-book of a deceased person, entries were found, in the writing of the deceased, of payment of interest from W., together with another entry to the effect that W. had on a certain day "acknowledged a loan to this date." *Held*, that these entries were admissible in evidence, although the effect might be to show that W. was indebted to the deceased. — *Taylor v. Witham*, 3 Ch. D. 605.

See WILL, 1.

EXCHANGE. — See PARTITION.

#### EXECUTORS AND ADMINISTRATORS.

A creditor of a testator filed a bill stating that A. and B. were appointed executors by the testator, but that they had not proved the will; that they had taken possession of part of the personal estate and had paid therefrom certain legacies, but had not paid the testator's debts. The creditor further alleged that other defendants, C. and D., had obtained possession of part of the testator's personal estate, and threatened to dispose of it without paying the testator's debts; and he set forth his own debt and prayed for administration of the testator's personal estate, payment of his debts, and an injunction restraining all said defendants from parting with said estate in their hands. Demurrer, on the grounds that the executors had not yet proved the will, and that there could not be a suit for administration without a properly constituted legal representative before the Court; and that persons could not be sued for misappropriating a testator's assets without joining the legal representative and alleging fraud or collusion between them. Demurrer overruled. — *In re Lowett. Ambler v. Lindsay*, 3 Ch. D. 198; s. c. L. R. 10 Ex. 76, 337.

See LAW, MISTAKE OF; LEGACY, 9.

EXECUTORY ADVICE. — See SETTLEMENT, 1.

#### FIXTURES.

A tenant became bankrupt and his trustee sold the tenant's fixtures in the leased premises to the plaintiff, who sold them to the defendant, the landlord, but no memorandum of the sale was signed by the defendant. *Held*, that the sale of the fixtures during the tenancy was neither the sale of an interest in land within § 4, nor a sale of goods and chattels within § 17, of the Statute of Frauds, 29 Car. 2, c. 3, § 4, 17. *Lee v. Gaskell*, 1 Q. B. D. 700.

FOREIGN GOVERNMENT. — See NEGOTIABLE INSTRUMENT.

FRAUD. — See APPOINTMENT, 2; RELEASE OF DAMAGES; SETTLEMENT, 6.

#### FRAUDS, STATUTE OF.

K. informed his daughter and her intended husband that he had bought a house which should in the event of the marriage be his wedding present to his daughter. After the marriage the daughter and her husband entered into

possession of said house, a lease of which K. had bought subject to payment of certain instalments. K. paid all instalments which fell due in his lifetime, and died leaving a sum of £110 still to be paid, which fell due after his death. *Held*, that possession following K.'s promise took the promise out of the Statute of Frauds; and that K.'s agreement was to give a house free from incumbrances, and that therefore said £110 must be paid out of K's estate. — *Ungley v. Ungley*, 4 Ch. D. 73.

See FIXTURES; VENDOR AND PURCHASER, 2.

FREIGHT. — See MORTGAGE, 2.

#### GRANT.

A piece of land was conveyed to a grantee who covenanted to build a cotton-mill thereon; but the right was reserved to the grantor to work all mines and minerals under the land, making compensation for damage. The mill was built and the defendants who claimed under said grantor began to work the mines, thereby causing damage to the mill. The plaintiff prayed an injunction restraining the defendants from so working the mines as to cause injury to the plaintiff. Injunction refused. There was a remedy at law. — *Aspden v. Seddon*, 1 Ex. D. 496; s. c. L. R. 10 Ch. 394; 10 Am. Law Rev. 115.

See PRESCRIPTION.

GUARANTY. — See PRINCIPAL AND SURETY, 2.

#### HOTEL-KEEPER.

A professional nurse kept a house for the reception of invalids, whom she supplied with provisions on which she made a profit, and she also superintended the nursing of the invalids. *Held*, that she was a "keeper of a hotel," and, therefore, a "trader" within the Bankruptcy Act, 1869. — *Ex parte Thorne*. *In re Jones*, 3 Ch. D. 457.

#### ILLEGITIMATE CHILDREN.

A testator made a bequest in trust for the child or children of his daughter M. the wife of J., as M. should appoint. M. was the sister of the deceased wife of J., and therefore their marriage was illegal. M. appointed in favor of two children born before the date of said testator's will, and also in favor of a child of which she was *enceinte* at said date, and of another child begotten and born after the testator's death. The House of Lords decided that the first two children could take under said bequest although they were illegitimate. *Held*, that the child *en ventre sa mère* could also take under said bequest and appointment, but not the child begotten after the testator's death. — *Crook v. Hill*, 3 Ch. D. 773; see 6 H. L. 265; L. R. 6 Ch. 311.

INCOME. — See LEASE.

INJUNCTION. — See COVENANT; GRANT.

#### INSURANCE.

1. M. insured his life in the B. association, which subsequently, without consultation with its policy-holders, amalgamated with the E. Society and ceased to carry on business. Two years afterward the E. society by its directors



*Held*, that the bequests to E. and A. were not to be taken in satisfaction of the sums held by the testator in trust for said legatees. — *Fairer v. Park*, 3 Ch. D. 309.

5. A testatrix directed her debts and funeral and testamentary expenses and the legacies thereby bequeathed, to be paid by her executors; and after bequeathing certain pecuniary legacies and specific articles, she made a specific devise, and then gave her residuary real and personal estate to A. and B. upon certain trusts, and appointed A. and C. her executors. *Held*, that the residuary real estate was charged with the legacies, although the executors, who were not the trustees of the will, were directed to pay such legacies. — *In re Brooke*. *Brooke v. Rooke*, 3 Ch. D. 630.

6. A testator gave his real and personal property to his wife for life, and directed the principal to be equally divided after his wife's death "amongst all my family that shall be then living, when they shall attain the age of twenty-one years." At the date of the will, the testator's wife and seven children were living, some twenty-one, some under that age, and one married and having children. At the death of the wife, three children were surviving; two had died unmarried; one had died leaving a widow; and one had died leaving a widow and children. *Held*, that the testator's children could alone take under the words "my family." — *Pigg v. Clarke*, 3 Ch. D. 672.

7. A testator directed that his debts and funeral expenses should be paid by his executors "from money or promissory notes, or bills due at the time of my decease at the bank and elsewhere, the remainder to be equally divided to my surviving children." There were previous gifts in the will of various portions of the testator's property. *Held*, that the above gift of the remainder only included the remainder of said money notes and bills, and was not a general residuary gift. — *Jull v. Jacobs*, 3 Ch. D. 708.

8. A testatrix bequeathed to each of the three children of "Mrs. W., widow of the late W.," £100. At the date of the will the said Mrs. W. had been married for fifteen years to a second husband, to the testatrix's knowledge, and had had by him six children. By her first husband she had had five children of whom two were living at the date of said will. *Held*, that said two children by the first husband were alone entitled to the legacy. — *Newman v. Piercey*, 4 Ch. D. 41.

9. Legacy from B. to "the executors or executrix of C., the sum of £100." At the date of B.'s will C. was dead, and in his will had appointed an executor and two executrices, all of whom predeceased B. It was contended that B. had made a gift to *personæ designatæ*, and that by their death the legacy lapsed. *Held*, that the legacy was given to the legal personal representatives of C. and did not lapse. — *Trethewy v. Helyar*, 4 Ch. D. 53.

10. A bequest of "foreign bonds" by an Englishwoman, was held not to include bonds issued by the colony of New South Wales. — *Hull v. Hill*, 4 Ch. D. 97.

See ANNUITY, 1; APPOINTMENT, 3; CHARITY; CONTINGENT REMAINDER; DEVISE; ELECTION; ILLEGITIMATE CHILDREN; LAW, MISTAKE OF; PERPETUITY; PRIORITY, 2; REMAINDER; SETTLEMENT, 3; TRUST, 3; WILL.

LICENSE. — See EVIDENCE, 1.

## LIEN.

1. C., a solicitor, was instructed to prepare a mortgage, and the mortgagor deposited with him the title-deeds of the property for that purpose. C. also acted as solicitor of the mortgagees, and after the mortgage was completed, held the deeds on their behalf. The mortgagor became bankrupt, and his trustee directed C. to sell the equity of redemption, and it was accordingly sold and the money paid to C., who claimed a lien on the deeds as against the mortgagor for the amount of his costs due from the mortgagor. *Held*, that the solicitor was entitled to such lien and to retain his costs from said money in his hands. — *In re Messenger*. *Ex parte Calvert*, 3 Ch. D. 317.

2. S., who was a timber merchant, agreed to carry on business as the agent of a firm, but in his own name as before, and the firm agreed to remunerate S. for his services by a share in the profits in the business. No notice of this arrangement was given to outside creditors. Timber was forwarded by the firm to S. for sale, and dealt with by him as absolute owner. The firm drew bills on S., which were accepted by him on the firm's undertaking to protect such acceptances, according to a term of the agreement between S. and the firm. The firm and subsequently S. went into liquidation. S. claimed a lien on timber in his hands, which had been sent to him by the firm as above, to the extent of certain bills accepted by him as aforesaid and of a further sum due him from said firm as his share of profits in the business. *Held*, that S. was entitled to such lien. — *In re Fawcus*. *Ex parte Buck*, 3 Ch. D. 795.

See CHARTERPARTY, 2; PARTNERSHIP.

LIGHT AND AIR. — See PRESCRIPTION.

LIMITATION. — See ANNUITY, 1.

The English Statute of Limitations (3 & 4 Will. 4, c. 27) does not apply to the island of Jamaica, because the island is not referred to in the English statute. — *Pitt v. Lord Dacre*, 3 Ch. D. 295.

MARRIAGE. — See FRAUDS, STATUTE OF.

MARRIAGE SETTLEMENT. — See APPOINTMENT, 1.

MARRIED WOMEN. — See APPOINTMENT, 1.

MARSHALLING ASSETS. — See PRIORITY, 1.

MASTER AND SERVANT. — See ESTOPPEL, 2.

MINE. — See GRANT.

## MORTGAGE.

1. A power of sale mortgage contained a proviso that, upon any sale purporting to be made in pursuance of said power, the purchaser should not be bound to see as to whether there had been default in payment of principal or interest by the mortgagor, and that notwithstanding any impropriety or irregularity in said sale the same should, so far as regarded the safety and protection of the purchaser, be deemed to be within said power and to be valid and effectual accordingly; and that the mortgagor's remedy should be in damages

only. The mortgagee conveyed the mortgaged property under said power to the defendant for valuable consideration. The plaintiff who was an incumbrancer of said mortgagor subsequent to said mortgagee, filed a bill to establish his priority over the defendant, alleging that if the accounts were examined it would appear that the prior mortgagee's debt was satisfied, and that the sale under said power was therefore invalid. *Held*, that said sale was valid, although the mortgage debt might have been paid. — *Dicker v. Angerstein*, 3 Ch. D. 600.

2. On Dec. 1, 1874, M., the owner of a vessel, mortgaged it to the plaintiffs for £7,500. On Jan. 4, 1875, the defendants, in ignorance of said mortgage, advanced M. £3,000 on security of a cargo shipped by M. on nominal freight of one shilling a ton. Feb. 2, 1875, M. again mortgaged said vessel to the plaintiffs for £4,000. February 19, M. and the defendants sold said cargo to J. on terms of freight being paid at fifty-five shillings a ton. On February 22, the defendants advanced £9,000 further to M. On February 26, M. assigned to the defendants said freight at fifty-five shillings per ton as security for their advances. On March 6, the plaintiffs registered their mortgage, and on the vessel's arrival took possession. The defendants acquired J.'s rights. *Held*, that the plaintiffs were entitled to said freight of fifty-five shillings per ton as against the defendants. — *Keih v. Burrows*, 1 C. P. D. 722.

See ESTOPPEL, 1; LIEN, 1; PRIORITY, 1; TRUST, 3.

NATURALIZATION. — See DOMICILE.

NEGLIGENCE. — See ACT OF GOD.

#### NEGOTIABLE INSTRUMENT.

The Russian Government issued scrip which upon its face undertook to give the bearer a bond for a certain sum when all instalments due on the scrip had been paid. By the custom of the English and Foreign Stock Exchanges, such scrip was treated as a negotiable instrument transferable by delivery. The plaintiff purchased some of said scrip and left it in the hands of C., who raised money upon it by pledging it as security with the defendants, and absconded. *Held*, that the defendants were as against the plaintiff entitled to said scrip and its proceeds. — *Goodwin v. Roberts*, 1 App. Cas. 476.

NOTICE OF DISHONOR. — See BILLS AND NOTES, 3, 4; PRIORITY, 3.

NOVATION. — See INSURANCE, 1.

#### PARTITION.

Trustees of one undivided moiety of an estate were authorized to make a partition; other trustees of the second moiety were authorized to sell, dispose of, convey, and assign, by way of sale for money or of exchange for an equivalent or recompense in lands. The two sets of trustees executed a partition deed. *Held*, that said partition was valid. — *In re Frith and Osborne*, 3 Ch. D. 618.

#### PARTNERSHIP.

Shares in a certain bank were subject to a lien in favor of the bank for all moneys due from the shareholder alone or jointly. Certain of such shares

stood in the name of A., one of the firm, which became bankrupt owing money to the bank. The shares were originally the property of A., but after the formation of said partnership were entered upon books of the firm as its property. Of this the bank was ignorant, and it had no knowledge that the firm claimed any interest in the shares until after the bankruptcy proceedings were begun; but the whole of said debt to the bank was contracted after said shares became partnership property. The bank contended that it was entitled to treat the shares standing in A's name as his separate property. *Held*, that said shares were the joint property of the firm, and that the bank could only prove in the bankruptcy proceedings for the balance of their debt after giving credit for the value of the shares. — *In re Collie. Ex parte Manchester and County Bank*, 3 Ch. D. 481.

#### PATENT.

1. In a question of validity of a patent granted in England, it appeared that an American work containing a "claim," together with a short and imperfect description of the invention was sent to the Patent Office in London two years before the English patent was granted, and a book of illustrations containing a drawing of the invention five weeks before the English patent. *Held*, that the invention had not been so published as to deprive the English patent of novelty. Consideration of the sufficiency of a specification and description, and the requisite amount of novelty of a patent. — *Plimpton v. Malcolmson*, 3 Ch. D. 531.

2. If there is a patent for a combination, the combination itself is *ex necessitate*, the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence. By Lord Chancellor Cairns; and see the remarks of the Lords on new combinations, in *Harrison v. Anderston Foundry Co.*, 1 App. Cas. 574.

See EVIDENCE, 1; TRADE-MARK.

PAYMENT. — See BILLS AND NOTES, 2.

#### PERPETUITY.

A testator devised his real and personal estate to trustees, upon trust to pay the income to his wife until her death or second marriage, remainder upon trust for all the testator's children living at such death or second marriage and the issue of any child then dead, such issue to take their parent's share in equal proportions; the shares of such of the testator's children or grandchildren as should be sons, to become vested in and payable to them when they respectively attained the age of twenty-four years, and the shares of the testator's daughters or the female issue of any deceased child to be settled upon certain trusts. *Held*, that all the gifts after the death or second marriage of the testator's wife were void for remoteness. — *Hale v. Hale*, 3 Ch. D. 643.

See ANNUITY, 2.

PLAN. — See VENDOR AND PURCHASER, 2.

#### PLEADING.

The plaintiff and defendant exchanged benefices under an agreement according to which no payment was to be made by either for dilapidations. The

plaintiff sued the defendant for the cost of repairs which had to be made on the building of the benefice which he received from the defendant, and the defendant pleaded said agreement. The plaintiff replied that at the time of making said agreement and exchange the defendant stated to the plaintiff that the repairs of the buildings of his benefice were merely nominal or equal in amount to the repairs of the plaintiff's benefice, whereas in fact the defendant "knew or ought to have known" that the repairs of his benefice greatly exceeded in amount those of the plaintiff's benefice. *Held*, that the plaintiff's replication was bad as it did not allege that said inequality in the amount of the respective dilapidations was known to the defendant at the time of said agreement. — *Wright v. Davies*, 1 C. P. D. 638.

POWER. — See APPOINTMENT; MORTGAGE, 1; PARTITION; SETTLEMENT, 1, 7.

#### PREScription.

The plaintiff purchased houses more than twenty years old abutting at the rear upon a private way. Subsequently and by a different title he acquired other houses in the rear of the first houses, and abutting at their rear on said way. The plaintiff sold the latter houses to the defendants together with the land up to the back wall of the first houses, and including the land over which said way ran; and no easement was reserved to the plaintiff. The defendants pulled down their houses, and erected partly on their site and partly on the site of said way, a large building which obstructed the plaintiff's light. *Held*, that the defendants had a right to obstruct the plaintiff's light. — *Ellis v. Manchester Carriage Co.*, 2 C. P. D. 13.

PRINCIPAL AND AGENT. — See ESTOPPEL, 2.

#### PRINCIPAL AND SURETY.

1. D. contracted to purchase tar from a gas company and to pay within fourteen days from the monthly making up of accounts, unless the company should allow a longer time for payment. The defendant was a surety on a bond given by D. for the due performance of said contract. One of said accounts was made up on August third, and on the twenty-first of the month the secretary sent D. a note for the amount due and which had not been paid, with the request that D. would sign and return the note; which D. did. *Held*, that if taking the note was giving time by the company, such time was given after the fourteen days had expired and the liability of the surety had attached; and that he was therefore absolved from his agreement altogether. — *Croydon Gas Co. v. Dickinson*, 1 C. P. D. 707.

2. N., who was a creditor of the plaintiffs, agreed among other things to transfer to them certain shares in a company, and redeem them before Jan. 1, 1874, and that his book debts should be collected, and one-half applied toward the redemption of the shares; and, whenever the par value of one or more of said shares was received by the plaintiffs, they were to deliver to N. the shares so redeemed. The defendant guaranteed N's performance of his part of said agreement. Subsequently, in consideration of certain of said shares and a sum in cash, the plaintiffs released their interest in said book-debts. *Held*, that the

defendant's rights were so varied by the new agreement between N. and the plaintiffs, that the defendant was discharged. — *Polak v. Everett*, 1 Q. B. D. 669.

#### PRIORITY.

1. A company purchased iron works of G., and subsequently raised money upon its debentures secured by mortgage of all its funds, property, and effects. A year afterwards the company borrowed money of G. under an agreement according to which G. was to carry on the company's business and receive all moneys due the company, and apply them with his own loan in taking up acceptances of the company, and in paying the wages of its servants, and running expenses; and out of the remainder repay himself his loan with interest. The company was ordered to be wound up under the supervision of the Court, with whose sanction further advances were made by G. upon the same terms as before. Subsequently the property was sold by order of Court. *Held*, the claims of the debenture holders were to be paid in priority to the running expenses and the sums due G. — *In re Regent's Canal Ironworks Co. Ex parte Grissell*, 3 Ch. D. 411.

2. A testator bequeathed an annuity to his wife in lieu of dower, and gave other annuities to his children, and he gave certain other legacies. The testator gave a right of distress and entry to said annuitants, and charged his real estate with all his bequests. The only real estate which the testator owned had been conveyed to him with declarations against dower, which was thereby barred by virtue of the 6th section of the Dower Act. *Held*, that the testator's widow was not entitled to priority in respect of her annuity; and that said annuitants were not entitled to priority over the other legatees. — *Roper v. Roper*, 3 Ch. D. 714.

3. It is not the duty of a trustee of a fund, who has himself a charge upon it created by the *cestui que trust*, to communicate the charge to a person who gives him notice of a subsequent charge. — *In re Lever. Ex parte Wilkes*, 4 Ch. D. 101.

PROTEST. — See **BILLS AND NOTES**, 3, 4.

PROVISO. — See **ANNUITY**, 3; **MORTGAGE**, 1.

RAILWAY. — See **ESTOPPEL**, 2.

#### RELEASE OF DAMAGES.

Declaration to the effect that the plaintiff was injured by a collision upon the defendants' railway caused by the defendants' negligence. Answer, that the defendants paid the plaintiff a certain sum on account of his injuries and that the plaintiff gave a deed of release. Reply, that the defendants procured the plaintiff to execute said deed by fraudulently representing that said injuries were of a trivial and temporary nature, and that if they should afterwards turn out to be more serious than the plaintiff anticipated, he would still, even though he had executed the deed, be in a position to obtain and would obtain further compensation from the defendants in respect thereof: also that said injuries proved more serious than the plaintiff anticipated when he executed said deed. Demurrer. *Held*, that the plaintiff's reply was good on the ground that it stated that the deed was executed in consequence of the defend-

ant's misrepresentations as to the nature of said injuries. *Semble*, that fraudulent misrepresentation as to the effect of a deed can be relied upon as a defence to an action upon the deed. — *Hirschfeld v. London, Brighton, and South Coast Railway Co.*, 2 Q. B. D. 1.

#### REMAINDER.

1. A testator devised real and personal property to his daughter for life, "and after her decease the property to be equally divided between her children on their becoming of age." The daughter was one of the witnesses to the will, and the gift to her was consequently void under the 15th section of the Wills Act. The daughter had children living at the decease of the testator. *Held*, that there was a vested remainder in said daughter's children which they were to receive upon the determination of said daughter's life-estate, whether terminated by death or forfeiture; and that the forfeiture of said life-estate under said act, accelerated the remainder so that it took effect upon the death of the testator. — *Jull v. Jacobs*, 3 Ch. D. 703.

2. A testator devised his real estate to his two grandsons for life, remainder to their sons in tail, remainder in case said grandsons died without issue, to the testator's three granddaughters as tenants in common in tail with benefit of survivorship; and in case all said granddaughters should die without issue, leaving their father and mother or either of them surviving, then the testator gave said real estate to said father and mother and the survivor of them for life, and after the decease of such survivor to P. in fee. One of said grandsons survived the testator and all said granddaughters, but died without issue. One of said granddaughters survived both her parents. *Held*, that the remainder to said father and mother was vested, not contingent, and that P. therefore was entitled to said estate in fee upon the death of said surviving grandson. — *Leadbeater v. Cross*, 2 Q. B. D. 18.

See CONTINGENT REMAINDER.

REMOTENESS. — See ANNUITY, 2; PERPETUITY; SETTLEMENT, 1.

#### RENT-CHARGE.

A rent-charge charged upon a reversion in fee expectant on the determination of certain outstanding terms is a "free land or tenement" within 8 Hen. 6, c. 7. — *Dawson v. Robins*, 2 C. P. D. 38.

RESERVATION. — See GRANT; PRESCRIPTION.

RESIDUARY GIFT. — See APPOINTMENT, 3; LEGACY, 7.

RESTRICTION. — See ANNUITY, 3.

REVERSIONARY INTEREST. — See SETTLEMENT, 5.

SALE. — See BILLS AND NOTES, 1; FIXTURES; JURISDICTION; MORTGAGE, 1; PARTITION.

SATISFACTION. — See LEGACY, 4; SETTLEMENT, 3.

SCRIP. — See NEGOTIABLE INSTRUMENT.

#### SETTLEMENT.

1. By marriage settlement freehold property was conveyed to trustees to the use of M. for life, remainder to the use of all or any one or more exclu-

sively of the children, grandchildren, or other issue of M., to be born before the appointment as M. should by deed or will appoint. M. by will appointed to the use of his son in fee, but in case he should have no child who should attain twenty-one, then after the decease of said son to the use of M.'s grandson, B. *Held*, that the executory devise to B., the grandson, was void for remoteness; and that M.'s son had an absolute fee-simple in the estate. — *In re Brown and Sibly's Contract*, 3 Ch. D. 156.

2. H. by voluntary settlement assigned certain consols, mortgage debts, shares in a company, and furniture to trustees upon trust to pay her the dividends and allow her to use the furniture during her life; and after her death to invest and pay certain sums of money, part of the trust fund, in trust for certain specified *cestuis que trust*, and pay the residue of the trust moneys and deliver said furniture to F. By her will dated ten years after said settlement H. confirmed the settlement. F. died before H. H. retained possession of the securities for the mortgage debts, and part of such debts were received by her in her lifetime, and the remainder were received by the trustees. No legal transfer of said shares was made to said trustees by H. *Held*, that the will perfected the settlement as being a testamentary settlement so far as regarded the shares, but not so far as regarded the mortgage debts received by H., and that the *cestuis que trust* who predeceased the testator could not take, and their shares went to the residuary legatee under H.'s will. — *Bizzey v. Flight*, 3 Ch. D. 269.

3. Personal property was settled in trust for such persons as W. should during coverture appoint, and subject thereto in trust for W. for life, and in case she survived her husband (which event happened) in trust for W. absolutely after the decease of her husband. Subsequently upon the marriage of her daughter, W. covenanted that £1,000 should be paid to the trustees of her daughter's settlement upon trust for the daughter for life, and after her decease in trust for her daughter's husband for life, with certain further trusts for children. W. by her will, which was expressed to be made in exercise of her above-mentioned power of appointment, bequeathed £1,000 upon trusts similar to those of the sum settled upon her daughter omitting the husband's life-interest. *Held*, that said personal property settled on the above trusts for W. was bound by her general engagements, and therefore by her covenant upon the marriage of her daughter; but that said bequest of £1,000 amounted to a satisfaction of said covenant.

W. received after her husband's death certain dividends, and railway stock, which she had purchased from the proceeds of a portion of said personal property. *Held*, that said dividends and stock did not pass under a bequest of residuary estate in W.'s said will. — *Mayd v. Field*, 3 Ch. D. 587.

4. A fund was settled on trustees upon trust to pay the income to A. for life, and after her death to her husband B. for life, and after the death of A. and B. upon trust to transfer the principal sum together with all dividends and interest which might be then due thereon unto and amongst all the children of A. and the issue of such children, in equal proportions, to be paid or transferred to such children as should be sons, at the age of twenty-one years, and to such children as should be daughters, at the age of twenty-one years or day of marriage whichever should first happen, the issue of any child whose



parent should die before his or her share should become payable to be entitled to the share which his or her parent would have been entitled to if living. A. died leaving two children who had attained twenty-one, and a grandchild, the plaintiff, who was the son of a deceased child of A., who had attained twenty-one in A.'s lifetime. *Held*, that the plaintiff was entitled to one-third of said fund. — *Day v. Radcliffe*, 3 Ch. D. 654.

5. Upon the marriage settlement of A. and B. they covenanted that any real or personal estate to which A. (the wife) then was, or during the coverture should become, entitled, should be settled upon the trusts of the settlement. At the date of the settlement A. was entitled upon her death without issue to one moiety of a trust fund subject to a life-estate of B. *Held*, that A.'s contingent reversionary interest in said trust fund was bound by said covenant and did not pass to B., her husband. — *Cornwell v. Keith*, 4 Ch. D. 767.

6. P. being free from debts and liabilities settled, in 1858, £1,000 in trust to pay the income to himself until he should assign, charge, or otherwise dispose of the same by anticipation, or until he should be found or declared a bankrupt, and then upon trust to pay the income to his wife for life; remainder upon trusts for children with ultimate remainder in P. In 1873, P. entered into business, and in 1875 was adjudged a bankrupt. *Held*, that said settlement was void *in toto* as against creditors. — *In re Pearson. Ex parte Stephens*, 3 Ch. D. 807.

7. Real estate was devised to a woman with an expression of wish that in case the woman should marry, she should before marrying settle the estate for her own use for life, and to such uses as she should by will, and notwithstanding coverture, appoint. The woman married and had a child, and subsequently joined with her husband in a deed purporting to be in execution of said wish, whereby said estate was settled upon certain trusts for the wife, her husband, and their children. Subsequently the husband and wife mortgaged the estate without informing the mortgagee of the settlement. *Held*, that the settlement was for good consideration and was not void against the mortgagee under 27 Eliz. c. 4. — *Teasdale v. Braithwaite*, 4 Ch. D. 85.

See APPOINTMENT.

SHAREHOLDER. — See PARTNERSHIP; WILLS, 2.

SHIP. — See BILL OF LADING; CHARTERPARTY; INSURANCE, 3; MORTGAGE, 2.

SOLICITOR'S LIEN. — See LIEN, 1.

SPECIFIC APPROPRIATION. — See BILL OF LADING; BILLS AND NOTES, 1; ESTOPPEL.

SPECIFIC BEQUEST. — See LEGACY, 3, 5.

SPECIFIC PERFORMANCE. — See COVENANT; VENDOR AND PURCHASER, 1.

#### STATUTE.

By statute any person who should "wilfully throw" rubbish into certain rivers, or "any drains, trenches, or watercourses thereunto belonging," was subjected to a fine. A tanner discharged his rubbish at a distance of four miles from one of said rivers, into a small natural stream which ran into such

river. *Held*, that said "drains, trenches, or watercourses," comprised only artificial watercourses made by man; and that refuse thrown into the stream by the tanner in the course of his trade was not thrown in "wilfully" within the meaning of the statute; and that the tanner was not therefore subject to a fine. — *Smith v. Barnham*, 1 Ex. D. 419.

See HOTEL-KEEPER; LIMITATIONS, STATUTE OF; TRADE-MARK, 2.

STATUTE OF FRAUDS. — See FIXTURES; FRAUDS, STATUTE OF; VENDOR AND PURCHASER, 2.

STATUTE OF LIMITATIONS. — See LIMITATIONS, STATUTE OF.

STOCK EXCHANGE. — See NEGOTIABLE INSTRUMENT.

SURETY. — See PRINCIPAL AND SURETY.

TENANT FOR LIFE. — See DEVISE, 3; LEASE.

TENEMENT. — See RENT-CHARGE.

TITLE. — See PARTITION.

#### TRADE-MARK.

1. H., a cigar-dealer in London, had a correspondent G. in Havannah, of whom he bought cigars. H. employed an artist to design a label having a picture and motto upon it, and H. registered the label at Stationers' Hall. H. then wrote to G. requesting him to put this label upon the boxes of cigars he consigned to H., which G. accordingly did, adding the words "G., manufacturer of cigars, Havannah." G. subsequently sent boxes of cigars with said label upon them to his agents in England, and H. prayed an injunction restraining said agents from selling cigars with said label affixed. Injunction refused. There was no contract by G. that he would furnish any cigars to H., or that he would not furnish any cigars with said label to any one other than H.; and, as H. did not allege that he had any stock of said cigars on hand, it did not appear that he would be injured by G.'s selling cigars with said label to others. Moreover the label represented that said cigars were manufactured by G., as in fact they were; so that the public was not deceived nor H. injured. — *Hirsch v. Jonas*, 3 Ch. D. 584.

2. A word or combination of letters is not "a distinctive device, mark, or heading," within the Trade-Marks Registration Act, 1875, and cannot be registered as a trade-mark. — *Ex parte Stephens*, 3 Ch. D. 659.

TRADER. — See HOTEL-KEEPER.

#### TRUST.

1. A testator bequeathed £12,000 to two trustees upon trust to invest the whole, or such part as they thought proper, in the purchase of an advowson; and until J., the testator's son, should be presented to some benefice which should produce an annual income of £1,000 at least, or should die, upon trust to present some fit person to the benefice of which they should have purchased said advowson, and subject as aforesaid to hold said advowson in trust for J. and his heirs. And until said trustees made said investment, they were directed to invest and accumulate said sum for a period of twenty-one years from the testator's death, after which the income of said sum and its accumu-

lations was to belong to J. And in case J. should die or be presented to a benefice as aforesaid before said trustees had purchased said advowson, said sum and its accumulations were to belong to J., his executors and administrators. Twelve years after the testator's death the trustees held said sum and its accumulations and had purchased no benefice. J. claimed to be entitled to the entire fund on the ground that he was the exclusive object of the trust. *Held*, that J. was not absolutely entitled to said fund. — *Gott v. Nairne*, 3 Ch. D. 278.

2. A trustee who had a life-interest in the trust estate committed breaches of trust by selling portions of the estate and applying the proceeds to his own uses, and subsequently went into bankruptcy. *Held*, that trustee's estate for life could not be appropriated to repairing the loss occasioned by said breach of trust as against the assignee in bankruptcy, who would take the trustee's legal estate as assets of the bankrupt. — *Fox v. Buckley*, 3 Ch. D. 508.

3. A testator, who held a trust fund secured by mortgage, devised his real and personal estate to his wife and her executors, administrators, and assigns, upon trust to leave the same in existing investments, or to sell and convert into money, and out of the proceeds pay his debts and funeral expenses and certain legacies, and retain the income of the residue during her life; and subject as aforesaid, the remainder in trust for C. There was no express devise of trust estates. *Held*, that the mortgaged trust estate did not pass under the will. — *In re Smith's Estate*, 4 Ch. D. 70.

See ANNUITY, 3; CONTINGENT REMAINDER; LEASE; LEGACY, 4; PRIORITY, 3; SETTLEMENT. 4.

#### VENDOR AND PURCHASER.

1. The plaintiff agreed to sell, and the defendant to purchase, certain freeholds and leaseholds, and by the terms of the agreement the defendant was not to investigate or make any objection in respect of the title to said freeholds prior to the year 1841. It was discovered before completion of the agreement that the defendant owned said freeholds subject to a leasehold interest in the plaintiff, and that part of the leaseholds belonged to the plaintiff in fee. The plaintiff filed a bill for specific performance of said agreement. *Held*, that said condition did not preclude the defendant from refusing to complete said agreement, as the parties had contracted under a mutual mistake as to their respective rights. — *Jones v. Clifford*, 3 Ch. D. 779.

2. D. agreed to purchase certain property specified in a written contract which did not contain any plan of the property; and at the same time D. signed a memorandum written on the back of a plan, as follows: "Plan of property sold to and purchased by D., 23d Oct., 1874. N. B. — The property included in the purchase is edged with red colour." *Held*, that said memorandum was sufficient to incorporate the plan in the contract, and that the description in the contract was controlled by the plan. — *Nene Valley Drainage Commissioners v. Duncley*, 4 Ch. D. 1.

See BILLS AND NOTES, 1; COVENANT; PARTITION.

VESTED REMAINDER. — See REMAINDER, 2.

VIS MAJOR. — See ACT OF GOD.

WATER. — See ACT OF GOD.

WATERCOURSE. — See STATUTE.

#### WILL.

1. A testator executed a will and subsequently a codicil in duplicate, but the codicils bore different dates. One copy of the will and codicil was left by the testator at his banker's, and one copy he retained. Probate was granted of both wills and codicils, described as duplicates. *Held*, that evidence was admissible to show that the two codicils were not two distinct instruments, so as to give the legatee therein named cumulative legacies. — *Hubbard v. Alexander*, 3 Ch. D. 738.

2. A testator owning certain shares in different companies declared that the calls, if any, which might be or become due in respect of any shares constituting part of his personal estate, should be paid by the trustees of his will out of the income and not out of the principal of his estate. The testator owned shares upon which calls were at the time of his death due, though not payable. *Held*, that such calls must be paid from income. After the testator's death new shares in a company were allotted to and accepted by the executors in respect of shares owned by the testator in such company. *Held*, that calls upon such shares were payable out of the principal. — *Bevan v. Waterhouse*, 3 Ch. D. 752.

See ANNUITY, 1, 2; APPOINTMENT, 1, 3, 4; CHARITY; CONTINGENT REMAINDER; DEVISE; ELECTION; ILLEGITIMATE CHILDREN; LEGACY; PERPETUITY; PRIORITY, 2; REMAINDER; SETTLEMENT, 2, 3; TRUST, 3.

#### WORDS.

"*Device, mark, or heading.*" — See TRADE-MARK.

"*Drains, trenches, or watercourses.*" — See STATUTE.

"*Family.*" — See LEGACY, 6.

"*Foreign Bonds.*" — See LEGACY, 10.

"*Free land or tenement.*" — See RENT-CHARGE.

"*Hotel-keeper.*" — See HOTEL-KEEPER.

"*Meeting.*" — See COMPANY.

"*Payable.*" — See SETTLEMENT, 4.

"*Wilfully.*" — See STATUTE.

## SELECTED DIGEST OF STATE REPORTS.

[For the present number of the Digest, selections have been made from the following volumes of State Reports: 29 Arkansas; 11 Bush (Kentucky); 55 Georgia; 52 Indiana; 16 Kansas; 65 Maine; 43 Maryland; 119 Massachusetts; 33 Michigan; 50 Mississippi; 63 New York; 79 Pennsylvania State; 44 Texas; 48 Vermont; and 8 West Virginia; also from 92 United States.]

ABANDONMENT. — See INSURANCE (MARINE).

## ACT OF GOD.

A prisoner gave bond with surety, conditioned for his appearance at court on a future day; on that day he was prevented by sickness from appearing, and did appear a few days after when he was well enough. In an action on the bond against the surety, *held*, that he had a good defence. — *Scully v. Kirkpatrick*, 79 Penn. St. 324.

## ACTION.

1. Defendant had by contract the right to float logs through plaintiff's dam, and was bound by the same contract to repair and pay for all damage done by him. *Held*, that he was also liable in an action of tort for damage negligently done by him. — *Dean v. McLean*, 48 Vt. 412.

2. No action lies in the Court of Claims against the United States, on a contract for secret services during the war, made between the plaintiff and the President; for though such contract was lawful, and the President had authority to make it, it is against public policy that its nature or circumstances should be disclosed. — *Totten v. United States*, 92 U. S. 105.

See ATTACHMENT, 2; JUDGMENT, 1; LORD'S DAY, 3; MUNICIPAL CORPORATION, 1; NEGLIGENCE; OFFICER; PARENT; RECEIVER; SHIP; VENDOR AND PURCHASER.

ADMINISTRATION. — See EXECUTOR.

ADMISSION. — See LIMITATIONS, STATUTE OF, 1.

## ADOPTION.

By statute, a father may adopt his illegitimate child, which "shall thereafter be considered, as respects such father, legitimate, and capable of inheriting; and the same rights and duties shall exist between such father and child as if the child were born in lawful wedlock." *Held*, that a bastard adopted under the statute could not, as the representative of his deceased father, share in the distribution of the estate of a more remote ancestor. — *Safford v. Houghton*, 48 Vt. 236.

AFFIDAVIT. — See JURY.

## AGENT.

The agent of a life-insurance company accepted articles of personal property instead of money in payment of a premium on a policy to be issued by

the company. *Held*, that he exceeded his authority, and that the company was not bound by the policy. — *Hoffman v. John Hancock Mut. L. Ins. Co.*, 92 U. S. 161.

ALIEN. — See PRESUMPTION.

ALLOCUTUS. — See TRIAL, 2.

ALTERATION OF INSTRUMENTS. — See EVIDENCE, 5.

AMENDMENT. — See JURY.

AMICUS CURIAE. — See APPEAL.

#### APPEAL.

One who has been heard in a cause merely as *amicus curia*, has no right to prosecute an appeal, writ of error, or other proceeding to revise the judgment of the court. — *Martin v. Tapley*, 119 Mass. 117.

See ATTACHMENT, 1; CONSTITUTIONAL LAW, STATE; CONTEMPT.

#### ARBITRATION.

At the hearing before arbitrators, to whom an action had been referred under rule of court, the defendants put in evidence of set-off and payment, not having pleaded either matter in bar of the action. *Held*, that the evidence was inadmissible, that the arbitrators were wrong in receiving it, and that their award in favor of the defendants must be set aside, as embracing matters not submitted. — *Austin v. Clark*, 8 W. Va. 236.

#### ASSAULT.

Two persons who by consent fight with their fists, though there is no anger or mutual ill-will, are indictable for assault and battery on each other. — *Commonwealth v. Collberg*, 119 Mass. 350.

See EVIDENCE, 2.

ASSIGNMENT. — See FOREIGN JUDGMENT.

ASSUMPSIT. — See DAMAGES, 2; INSURANCE (FIRE), 1; PARTY-WALL.

#### ATTACHMENT.

1. Where a judgment for the defendant in a suit begun by attachment of land is reversed on error, the lien of the attachment is preserved, at least as between the parties. — *Harrison v. Trader*, 29 Ark. 85.

2. An attachment of real estate was made by lodging a copy of the writ with the town clerk, who failed to record it, by reason of which the land was afterwards sold to a *bona fide* purchaser. *Held*, that the attachment was lost, and that the attaching creditor had good cause of action against the town clerk. — *Burchard v. Fair Haven*, 48 Vt. 327.

See FOREIGN JUDGMENT; JUDGMENT, 1; NAME, 2.

#### ATTORNEY.

1. The mayor of a city was employed as attorney to defend an action brought against the city. *Held*, that he was entitled to recover of the city the value of his services as attorney. — *Niles v. Muzzy*, 33 Mich. 61.

2. An attorney who had been retained under a special contract to conduct a case, afterward took a partner. *Held*, that they could not sue jointly for

~~fees~~ under the contract, without proof that the partner was admitted as a party to the contract; and that evidence that the client consulted or talked to him about the case, was not sufficient proof of this. — *Carr v. Wilkins*, 44 Tex. 424.

See BAIL.

AUTREFOIS ACQUIT. — See NEW TRIAL; TRIAL, 1.

AWARD. — See ARBITRATION.

#### BAIL.

A statute forbade the taking of attorneys as bail. *Held*, that a bail-bond executed by an attorney was nevertheless valid. — *Holandsworth v. Commonwealth*, 11 Bush, 618.

See LORD'S DAY, 1.

BANK. — See CHECK.

#### BANKRUPTCY.

The jurisdiction of a State court to enforce a vendor's lien is not ousted by the vendee's bankruptcy and discharge. (Overruling former decisions.) — *Elliott v. Booth*, 44 Tex. 180; *Boone v. Revis*, ib. 384.

BASTARD. — See ADOPTION.

BATTERY. — See ASSAULT.

#### BIGAMY.

In a prosecution for bigamy it is not necessary to prove an actual marriage, but proof that the prisoner has declared himself and been reputed to be married, will support a conviction. — *Commonwealth v. Jackson*, 11 Bush, 679.

#### BILLS AND NOTES.

A written promise to pay a certain sum at four months from date, with legal interest, and also "a reasonable attorney's fee if this bill shall be sued on," *held*, negotiable and not usurious. — *Gaar v. Louisville Banking Co.*, 11 Bush, 180.

See CHECK; EVIDENCE, 5; INDORSER; LIMITATIONS, STATUTE OF, 2; MORTGAGE.

BONA FIDE PURCHASER. — See ATTACHMENT, 2; MORTGAGE; MUNICIPAL CORPORATION, 2.

BOND. — See ACT OF GOD; MUNICIPAL CORPORATION, 2.

BURDEN OF PROOF. — See EVIDENCE, 1, 2, 4, 5, 6, 8.

#### BURGLARY.

By statute, it is burglary to break into "a place of business," with intent to steal. On an indictment charging the prisoner with breaking and entering a mill-house, with intent to steal corn therefrom, *held*, that it did not appear that the mill-house was a place of business, and that the prisoner could not be convicted of burglary. (JACKSON, J., dissenting.) — *McElreath v. The State*, 55 Ga. 562.

#### BY-LAW.

A city empowered by its charter to tax itinerant traders cannot make a

valid ordinance taxing only such itinerant traders as are non-residents of the city. — *Gould v. Mayor, &c., of Atlanta*, 55 Ga. 678.

See EVIDENCE, 6; INJUNCTION, 2.

CARRIER. — See DAMAGES, 1; RAILROAD.

#### CHARITY.

1. A gift to certain persons named, "and to such as they shall associate to themselves, their heirs and successors for ever, for the erecting of a house for their assembling themselves together publicly to worship God," *held*, not a public charity. — *Old South Society v. Crocker*, 119 Mass. 1.

2. Property was bequeathed by a testator in Massachusetts in trust for charitable uses, to a town in New York, which was incapable, by the law of that State, of taking the trust. *Held*, that the bequest was not void, but might be paid to the town upon the latter being enabled, by special statute of New York, to take the trust and administer it according to the will. — *Fellows v. Miner*, 119 Mass. 541.

CHARTER. — See CORPORATION, 1, 3.

#### CHECK.

A creditor received, on account of his debt, at his own dwelling, late in the evening of Wednesday, his debtor's check on a bank in a town fifteen miles away. The mail to that town on the next day was closed at the post-office nearest to, and three or four miles from, the creditor's dwelling, at 7.30 A.M.; and the next mail closed on Saturday at the same hour. The check was not sent by either mail; the bank on which it was drawn stopped payment at noon on Saturday. The mail arrived regularly between 11 A.M. and noon. *Held*, that there was no laches in not sending the check on Thursday; nor on Saturday, because, if the creditor had then sent it to his agent, the latter would have had at least all that day in which to present it; and therefore that the debtor was not discharged. — *Cox v. Boone*, 8 W. Va. 500.

CHURCH. — See CHARITY, 1; TRUST, 1.

CITIZEN. — See CONSTITUTIONAL LAW, 4.

COMMERCE. — See CONSTITUTIONAL LAW, 7.

COMMON CARRIER. — See CARRIER.

CONFESSION. — See BIGAMY.

CONFISCATION. — See FORFEITURE.

CONFLICT OF FEDERAL AND STATE AUTHORITY. — See JURISDICTION, 1.

#### CONFLICT OF LAWS.

A creditor of an insolvent estate, resident in another of the United States, is entitled to share in the distribution of the estate *pari passu* with creditors of the same degree who are residents of the State where the distribution is made, in the absence of evidence that he has received any thing from assets elsewhere. — *Tyler v. Thompson*, 44 Tex. 497.

See FOREIGN JUDGMENT; LEX FORI.

CONSIDERATION. — See INSURANCE (FIRE), 1.



## CONSPIRACY.

Contracts for certain public supplies were required by statute to be awarded to the lowest bidder. The commissioners whose duty it was to procure the supplies agreed to buy them, and did buy them, without advertising for bids, being ignorant of the statute requiring them to do so. *Held*, that, as they had no corrupt intent, they were not guilty of a criminal conspiracy. — *People v. Powell*, 63 N. Y. 88.

See CONSTITUTIONAL LAW, 6; INDICTMENT, 2.

## CONSTITUTIONAL LAW.

1. The decree of a court in Texas during the war is within the constitutional requirement that full faith and credit shall be given in each State to the judicial proceedings of every other State. — *Hendry v. Cline*, 29 Ark. 414.

2. A State statute provided for the inspection of illuminating oils, and forbade the sale within the State of any that would not stand a certain test. *Held*, that the prohibition was constitutional as applied to oils patented under the laws of the United States, as well as in other cases. — *Patterson v. The Commonwealth*, 11 Bush, 311.

3. A State statute authorizing two overseers of the poor in any town, by writing under their hands, to commit vagrants to the work-house, *held*, to violate the Fourteenth Amendment to the Constitution of the United States. — *Portland v. Bangor*, 65 Me. 120.

4. Trial by jury in a common-law suit in a State court is not a privilege of national citizenship which the States are forbidden by the Fourteenth Amendment of the national Constitution to abridge. (CLIFFORD and FIELD, JJ., dissenting.) — *Walker v. Sauvinet*, 92 U. S. 90.

5. Congress has no power to regulate State elections, except so far as to secure the right to vote of persons otherwise qualified, irrespective of race, color, or previous condition of servitude; and therefore an act of Congress imposing a penalty for obstructing the exercise of the right of suffrage at State elections, not confined by its terms to obstructions on account of race, color, or servitude, is unconstitutional, and an indictment on it cannot be sustained. (HUNT, J., dissenting.) — *United States v. Reese*, 92 U. S. 214.

6. A conspiracy to deprive any person of life or liberty without due process of law, is an offence only against State authority, and Congress cannot make it punishable in the United States Courts. — *United States v. Cruikshank*, 92 U. S. 542.

So of a conspiracy to deprive citizens of the right to bear arms. — *Ib.*

So of a conspiracy to prevent citizens from peaceably assembling for lawful purposes; unless such assembly be for the purpose of petitioning Congress, in which case any interference with it is an offence against the United States. — *Ib.*

So of a conspiracy to obstruct the right of suffrage at State elections; unless such obstruction is on account of the race, color, or previous condition of servitude of the obstructed voters. — *Ib.*

7. A State statute required the owner of every vessel arriving from a foreign port, to give, for every passenger landed from the vessel, a bond in \$300, with two sureties, residents and freeholders of the State, conditioned that the

passenger should not for four years become a public charge within the State; or else, in lieu of such bond, to pay \$1.50 for each passenger. *Held*, unconstitutional as a regulation of commerce. — *Henderson v. Mayor of New York*, 92 U. S. 259.

So of a similar State statute, limited in its operation to "lunatics, paupers, convicted criminals, lewd women," and certain other specified classes of passengers; the decision of a commissioner, as to whether a passenger belongs to either class, being final. — *Chy Lung v. Freeman*, 92 U. S. 275.

See CORPORATION, 1, 3; INDICTMENT, 2.

#### CONSTITUTIONAL LAW, STATE.

A statute providing that the judgment of an inferior court should be final on motions to quash an indictment for defects in the grand jury which found it, *held* unconstitutional. — *Palmore v. The State*, 29 Ark. 248.

See NEW TRIAL; OFFICER; SCHOOL; WITNESS.

#### CONTEMPT.

An appeal lies from a sentence for contempt. — *Dobbs v. The State*, 55 Ga. 272. *Contra*, *Shattuck v. The State*, 50 Miss. 50.

#### CONTRACT.

The liability of one of two joint purchasers of land on the contract for the purchase-money, is not affected by the fact that the other purchaser is a married woman, who is incapable of contracting. — *Robinson v. Robinson*, 11 Bush, 174.

See ACTION, 1, 2; ATTORNEY, 2; BAIL; BILLS AND NOTES; CORPORATION, 2; DAMAGES, 2; EVIDENCE, 7; GUARANTY; ILLEGAL CONTRACT; INDORSER; INSURANCE; LIMITATIONS, STATUTE OF, 2; LORD'S DAY, 1, 2; MORTGAGE; PARENT; PARTNERSHIP; PARTY-WALL; SHIP; TRUST, 2; ULTRA VIRES; VENDOR AND PURCHASER.

CONTRIBUTION. — See PARTNERSHIP.

CONVERSION. — See DAMAGES, 3.

#### CORPORATION.

1. Provisions of a charter of incorporation, as to service of process on the corporation, relate only to the remedy, and may constitutionally be repealed, and are repealed by a subsequent general law making other provision for service of process on corporations. — *Cairo & Fulton R.R. Co. v. Hecht*, 29 Ark. 661.

2. The directors of a railroad company, in consideration that a county would take stock in the company and pay for it with county bonds, agreed that the company should pay interest on the stock to the holders of the bonds, in discharge of the interest due on the latter till their maturity. The company had no power by charter to make such a contract. *Held*, that it was *ultra vires*. — *Pittsburg & Steubenville R.R. Co. v. Alleghany County*, 79 Penn. St. 210.

3. A corporation, A., exempt by its charter from taxation, was consolidated with another, B., not exempt, "under the name and charter of" A., and sub-

ject to all rights and liabilities of both; each member of the B. to receive, on surrender of his stock, a like number of shares in the consolidated company. *Held*, that the A. company was not extinguished, nor its charter surrendered; that so much of the stock of the consolidated company as represented the property of A. was not taxable; and that the remainder was. — *Central R. R. Co. v. Georgia*, 92 U. S. 665.

See STOCK; ULTRA VIRES.

COURT OF CLAIMS. — See ACTION, 2.

CRIMINAL LAW. — See ASSAULT; BIGAMY; BURGLARY; CONSPIRACY; CONSTITUTIONAL LAW, 5, 6; CONSTITUTIONAL LAW, STATE; CONTEMPT; ERROR; EVIDENCE, 3, 4; FELONY; INDICTMENT; JUDGE; JURISDICTION, 1; LARCENY; MURDER; NAME, 1; NEW TRIAL; TRIAL, 1, 2, 3; VARIANCE, 2; WITNESS.

CUSTOM. — See MINE.

#### DAMAGES.

1. Action against a railroad company for negligence, whereby plaintiff lost one leg and much injured the other, was put to expenses for cure, and lost his baggage. The plaintiff claimed but \$5,500 for the two latter items, and did not claim exemplary damages. The verdict was in his favor for \$35,500. *Held*, excessive. — *Louisville & Nashville R.R. Co. v. Fox*, 11 Bush, 495.

2. In an action for breach of an agreement to convey land, the measure of damages is the value of the land at the time of the breach, less so much of the price as remains unpaid; and this, whether the failure to convey is through the defendant's wilful refusal, or through his *bona fide* inability so to do; but the plaintiff may, if he will, rescind the contract, and recover back so much of the price as he has paid, with interest, as money had and received. — *Dohertry v. Dolan*, 65 Me. 87.

3. Trover for timber. It appeared that the defendant cut the timber by mistake, and sent it to a remote market, where it was sold for a price much exceeding its value at the time and place of severance. The jury were instructed to give as damages either the value of the timber where it was taken, together with the profit which it might have brought in the ordinary market, or the market value at the place where it was actually sold, less the expense of sending it there. *Held*, correct. — *Winchester v. Craig*, 33 Mich. 205.

4. Action to recover damages for diverting a watercourse from plaintiff's tannery by means of a pipe placed by defendant on his own land. *Held*, that plaintiff could recover only for his damage actually suffered before action brought, and not for a permanent injury to his freehold; and therefore that evidence of the value of his tannery was incompetent. — *Bare v. Hoffman*, 79 Penn. St. 71.

5. Plaintiff's property, of which defendants were wrongfully in possession, was taken from them by process of law against plaintiff. *Held*, that they were liable for damages only to the time of such taking, whether or not such taking was lawful. — *Montgomery v. Wilson*, 48 Vt. 616.

See JOINT TORTFEASORS.

DEED.

A deed was duly signed, sealed, and recorded, but not delivered to the grantee till long after. *Held*, that although it might take effect as against the grantor from the time it was left for record, yet as against his attaching creditors it took effect only from the time of delivery to the grantee. — *Bell v. Farmers' Bank*, 11 Bush, 34.

See FIXTURE, 2; TRUST, 1.

DELIVERY. — See DEED.

DEVISE.

1. Devise to the children of testatrix for life, and on the death of either of them his share to his issue and their heirs for ever, and, if any of them shall die without issue, his share to the surviving child or children and to the heirs of said issue for ever. *Held*, that the children took only estates for life. — *Shreve v. Shreve*, 43 Md. 382.

2. Devise to J. S. for life, and after her death to her issue and their heirs for ever, in the proportions to which they would be entitled under the intestate laws. *Held*, a life-estate in J. S., remainder in fee to her children. — *Robins v. Quinliven*, 79 Penn. St. 333.

See CHARITY, 2.

DISTRIBUTION. — See ADOPTION.

DISTRICT OF COLUMBIA. — See SOVEREIGN.

DOWER.

A widow is not estopped to claim dower in her husband's land by accepting from the heir a conveyance of the land in fee with warranty; nor, if her dower has been assigned in the land, is it merged by such conveyance. — *McLeery v. McLeery*, 65 Me. 172.

ELECTION.

A State canvassing board has no power to throw out returns of votes which are genuine and regular in form, on the ground of fraud in the election; and, if it does throw out such returns, may be compelled by *mandamus* to meet again and re-count. — *Lewis v. Marshall County*, 16 Kans. 102.

See CONSTITUTIONAL LAW, 5.

EMBEZZLEMENT. — See VARIANCE, 2.

EQUITY. — See INJUNCTION; JURISDICTION, 2; NUISANCE; SUBROGATION; TRUST, 2.

EQUITY PLEADING. — See GUARDIAN.

ERROR.

Two prisoners, jointly indicted and convicted of larceny, brought their several writs of error. The court reversed the judgment as to one, and affirmed it as to the other. — *Wall v. The State*, 50 Miss. 396.

See APPEAL; ATTACHMENT, 1; TRIAL, 4.

ESCROW. — See DEED.

ESTOPPEL. — See DOWER; INSURANCE (FIRE), 2; JOINT TORTFEASORS.

## EVIDENCE.

1. In an action on a policy of insurance, if the defendant plead that the property insured was fraudulently burned by the plaintiff, he is not bound to prove this plea beyond a reasonable doubt. — *Etna Ins. Co. v. Johnson*, 11 Bush, 587. s. p. *Simmons v. [West Virginia] Ins. Co.*, 8 W. Va. 474.

2. In an action of tort (as for assault and battery), the fact that the tort which is the cause of action is also an indictable offence (as an attempt to ravish), does not compel the plaintiff to prove it beyond a reasonable doubt. — *Elliott v. Van Buren*, 33 Mich. 49.

3. The fact that a grant of land by the State exists and is matter of record is no evidence that one who utters a forged grant, purporting to convey the same land to a person other than himself, had notice of the forgery. — *Pearson v. The State*, 55 Ga. 659.

4. Indictment for the statutory offence of carrying concealed weapons, not being a traveller. *Held*, that the prosecutor was not bound to prove this negative, but that the burden was on the prisoner to show that he was a traveller. — *Wiley v. The State*, 52 Ind. 516.

5. In an action on a promissory note, in which the declaration avers that the defendant made the note and the answer denies this and alleges an alteration, proof of the defendant's signature is *prima facie* evidence that the whole note is his act, but the burden is on the plaintiff to show this. — *Simpson v. Davis*, 119 Mass. 269.

6. In an action against a city to recover for injuries caused to the plaintiff by a defect in the highway on which he was driving, the burden is on him, on the issue of due care, to show that he was driving at a rate no faster than that allowed by the city ordinances. — *Tuttle v. Lawrence*, 119 Mass. 276.

7. Action for non-delivery of wood under a contract to sell it at a certain price per cord, making no mention of any time of payment. *Held*, that the legal effect of the contract was that the wood should be paid for after it was all delivered; and that parol evidence was inadmissible to show that it was to be paid for in instalments as delivered. — *Brandon Manufacturing Co. v. Morse*, 48 Vt. 322.

8. In an action on a policy of life insurance, the defence was that the assured had in his application untruly answered questions as to his health and habits of life. *Held*, that the burden of proving these answers false was on the insurers. — *Piedmont & Arlington Life Ins. Co. v. Ewing*, 92 U. S. 377.

See ARBITRATION; BIGAMY; DAMAGES, 4; JURY; LEX FORI; LIMITATIONS, STATUTE OF, 1; NAME, 1, 2; PRESUMPTION; VARIANCE; WITNESS.

EXECUTION. — See SUBROGATION.

## EXECUTOR AND ADMINISTRATOR.

A debtor of J. S. in good faith paid the debt to one who had been regularly appointed administrator of J. S. *Held* (under the statutes of New York), that the debt was discharged, though J. S. was not in fact dead. (CHURCH, C. J., ALLEN and FOLGER, JJ., dissenting.) — *Roderigas v. East River Savings Inst'n*, 63 N. Y. 460.

See CONFLICT OF LAWS; LEX FORI.

## FELONY.

On an indictment for felony, the prisoner may be convicted of a misdemeanor. — *Hunter v. Commonwealth*, 79 Penn. St. 503.

FIRE INSURANCE. — See INSURANCE (FIRE.)

## FIXTURE.

1. Discussion of the difference between fixtures and fittings. — *Pratt v. Paine*, 119 Mass. 439; *Jarechi v. Philharmonic Society*, 79 Penn. St. 403.

2. The tenants under a lease of land on which were oil wells, assigned their lease by deed, conveying also "all our right, title, and interest, in and to the engines, boilers, tanks, tubing, derricks, and all other fixtures and personal property situate upon and appertaining to the above leasehold interest and well to us belonging." *Held*, that oil in the tanks did not pass. — *Dresser v. Transportation Co.*, 8 W. Va. 553.

FORECLOSURE. — See MORTGAGE.

FOREIGN ATTACHMENT. — See FOREIGN JUDGMENT; LIMITATIONS, STATUTE OF, 1.

## FOREIGN JUDGMENT.

A judgment recovered against J. S., in Pennsylvania, by a company incorporated in that State was assigned to a resident of the same State. After the assignment, but before J. S. had notice of it, he was summoned as garnishee of the company before a court in New York, where he resided, which court afterwards, and after he had notice of the assignment, adjudged him liable as such garnishee, notwithstanding the assignment, and he paid to the plaintiff in that suit the amount of his indebtedness on the judgment. *Held*, that after the assignment the company had no attachable interest in the judgment; that therefore the judgment of the court of New York, which had jurisdiction only on the ground of an attachment of the company's property, was void; and that satisfaction of it by J. S. was no bar to an action against him in Pennsylvania by the assignee of the judgment. — *Noble v. Thompson Oil Co.*, 79 Penn. St. 354.

## FORFEITURE.

The Confiscation Act, passed during the war, as explained by contemporaneous joint resolution of Congress, does not "work a forfeiture of the real estate of the offender beyond his natural life." *Held*, that a confiscation of the estate of an owner in fee not only forfeited his life-estate, but deprived him of all power over the estate during his life; and therefore that he could make no grant of the reversion valid against his heirs. — *Wallach v. Van Riswick*, 92 U. S. 202; *Chaffraix v. Schiff*, id. 214.

FORGERY. — See EVIDENCE, 3.

FRAUDS, STATUTE OF. — See TRUST 2.

FRAUDULENT CONVEYANCE. — See ILLEGAL CONTRACT, 1.

GARNISHMENT. — See FOREIGN JUDGMENT; LIMITATIONS, STATUTE OF, 1.

GRAND JURY. — See CONSTITUTIONAL LAW; STATE.

## GUARANTY.

Plaintiff having bought three thousand shares of certain stock, defendant indorsed on the bill of sale of the stock a guaranty against loss within thirty days. The guaranty was renewed from time to time, during which period plaintiff bought and sold many other shares of the stock, not keeping them separate from those first bought, but having always at least three thousand shares on hand; defendant was ignorant of these transactions. *Held*, that the guaranty extended only to the shares first bought; and that, as plaintiff had made it impossible to ascertain whether there was any loss on those specific shares, defendant was not liable. — *Strong v. Lyon*, 63 N. Y. 172.

## GUARDIAN.

A guardian cannot file a bill in equity in his own name as guardian to recover the distributive share of his infant wards in the estate of their ancestor; but the infants must sue by *prochein ami* in their own names. — *Burdett v. Cain*, 8 W. Va. 282.

HOMICIDE. — See MURDER; NEW TRIAL.

HUSBAND AND WIFE. — See BIGAMY; CONTRACT; DOWER.

## ILLEGAL CONTRACT.

1. Action to recover the price of goods sold. Defence, that the sale was a transaction to defraud plaintiff's creditors. *Held*, that plaintiff could not recover. — *Hindman v. Newman*, 55 Ga. 262.

2. The assignment of a contract to do work for a municipal corporation, the assignor remaining liable, *held*, not against public policy. — *Devlin v. Mayor, &c. of New York*, 63 N. Y. 8.

See BAIL; LORD'S DAY, 1, 2; ULTRA VIRES.

IMPRISONMENT. — See CONSTITUTIONAL LAW, 3.

## INDICTMENT.

1. Indictment for robbery of bank-bills, averring the value of the bills, but not their denomination. *Held*, bad. — *Arnold v. The State*, 52 Ind. 281.

2. The Act of Congress known as the Enforcement Act makes punishable conspiracies to hinder any citizen from the free enjoyment of any right or privilege secured to him by the Constitution of the United States. *Held*, that an indictment under this statute must show specifically what rights, secured by the Constitution of the United States, the defendants conspired to obstruct, and is not sufficient if it merely pursues the language of the statute. — *United States v. Cruikshank*, 92 U. S. 542.

See BURGLARY; EVIDENCE, 4; FELONY; MURDER; NAME, 1.

## INDORSER.

An indorsement without recourse implies a warranty that the note indorsed is valid. — *Hannum v. Richardson*, 48 Vt. 508.

INFANT. — See GUARDIAN.

## INJUNCTION.

1. An ordinance, unlawfully made by a city in excess of the power conferred by its charter, taxed certain traders on their sales, required them to make returns and pay taxes within an hour after the sales; and, if they failed to do so, provided that the tax should be collected by execution and the traders liable to fine and imprisonment. *Held*, that traders taxed might have an injunction to restrain the collection of the tax, and were not confined to their remedy at law. — *Gould v. Mayor, &c. of Atlanta*, 55 Ga. 678.

2. The erection of a wooden building within certain limits, in violation of a town ordinance, is not necessarily a nuisance; and therefore a court of equity will not restrain such erection, but will leave the party grieved to his remedy at law under the ordinance. — *St. Johns v. McFarlan*, 33 Mich. 72.

3. The courts of the United States will not grant an injunction to stay the collection of taxes, unless the plaintiff has actually paid or tendered all taxes which are admitted or appear on the pleadings, or are shown by affidavit, to be due. — *Taylor v. Secor*, 92 U. S. 575.

See NUISANCE.

## INSURANCE (FIRE).

1. Defendant sold land and buildings to plaintiff, taking from him a mortgage on the same to secure payment of the purchase-money. Defendant before the sale had insured the buildings in a mutual company; and, by the charter of the company, the premium note given by him continued to be a lien on the property after the sale. The insurers were notified of the sale and mortgage, and, a loss happening, paid it to defendant, who had promised plaintiff that, if he got it, he would pay it to him or allow it on the mortgage debt. *Held*, that in equity he was bound to do so; that such liability was sufficient consideration for his promise to do so; and that plaintiff might recover the insurance money in an action for money had and received. (*GRASON and ALVEY, JJ.*, dissenting.) — *Callahan v. Linthicum*, 43 Md. 97.

2. A policy was by its terms liable to forfeiture if any subsequent insurance should be made without notice to the insurers. A second insurance was made, without notice to the first insurers, by a policy which was void, but on which, nevertheless, the assured, after a loss, brought an action, and received a sum of money from the second insurers in settlement of the same. In an action afterward brought by him on the first policy, *held*, that he was not estopped to show that the second was void, and that on so showing he could recover. — *Lindley v. Union Ins. Co.*, 65 Me. 368.

3. In declaring on a policy of insurance which refers to the assurer's application for it, "which is his warranty and a part hereof," the plaintiff need not set out nor aver compliance with the warranties contained in the application. — *Simmons v. [West Virginia] Ins. Co.*, 8 W. Va. 474.

See EVIDENCE, 1; VARIANCE, 3.

INSURANCE (LIFE). — See AGENT; EVIDENCE, 8.

## INSURANCE (MARINE).

The master and crew of a vessel were compelled, by a peril insured against,



to leave her, and her owners abandoned her to the insurers; afterwards she was rescued by salvors. *Held*, that the insured could recover for a total loss. — *Snow v. Union Ins. Co.*, 119 Mass. 592.

See JUDGMENT, 2.

INTENT. — See CONSPIRACY.

INTEREST. — See BILLS AND NOTES.

JOINT CONTRACTORS. — See CONTRACT.

#### JOINT TORTFEASORS.

Plaintiff brought an action of tort against one who was jointly liable with defendant, and recovered judgment, which was satisfied in part; and afterwards brought an action against defendant, for the same cause. *Held*, (1) that the former judgment, without full satisfaction, was no bar to the second action; but (2) that plaintiff was estopped to claim in the second action greater damages than he had recovered in the first. — *United Society of Shakers v. Underwood*, 11 Bush, 265.

#### JUDGE.

The owner of stolen property is not disqualified to sit as judge on the trial of an indictment for the theft. — *Davis v. The State*, 44 Tex. 528.

See TRIAL, 3.

#### JUDGMENT.

1. A judgment against a non-resident, where jurisdiction is based only on an attachment of property, without personal service, is but a judgment *in rem*, and the plaintiff cannot maintain an action on that judgment, to obtain satisfaction out of other property of the defendant. — *Eastman v. Wadleigh*, 65 Me. 251.

2. A part-owner of a vessel mortgaged his share, insured the same "for the benefit of whom it may concern; loss payable to him," and was afterwards lost at sea with the vessel. His administratrix sued the insurers, and recovered judgment, which they satisfied. *Held*, a bar to an action against them on the policy by the mortgagee. (DICKERSON, J., dissenting.) *Sleeper v. Union Ins. Co.*, 65 Me. 385.

See CONSTITUTIONAL LAW, 1; ERROR; FOREIGN JUDGMENT; JOINT TORTFEASORS.

#### JURISDICTION.

1. Perjury committed before a United States commissioner, during the investigation of a charge of violating an Act of Congress, is not indictable in a State court. — *Ross v. The State*, 55 Ga. 192.

2. An act of Congress made a grant to a State for public purposes, and directed that it should be invested "in safe stocks." — *Held*, that it pertained exclusively to the State legislature to decide what investments were safe, and that the courts of the State had no control over the investments; though it was alleged in a suit brought in the name of the State that they were unsafe, and made by virtue of legislation obtained by fraud. — *State v. Vicksburg & Nashville R.R. Co.*, 50 Miss. 361.

See BANKRUPTCY; ELECTION; FOREIGN JUDGMENT; JUDGE; OFFICER; REMOVAL OF SUITS; SOVEREIGN.

## JURY.

In an action against two, a verdict for both defendants was declared by the foreman of the jury, received, and recorded. *Held*, that affidavits of the jury were admissible to show that the foreman made his announcement by mistake, and that they had in fact agreed to a verdict for one defendant, and against the other. — *Dalrymple v. Williams*, 63 N. Y. 361.

See CONSTITUTIONAL LAW, 4.

LACHES. — See CHECK.

## LARCENY.

One is not guilty of larceny who finds lost goods and converts them to his own use, without attempting to restore them to the owner, if he does not know, or have any means of ascertaining, who is the owner. — *Bailey v. The State*, 52 Ind. 462.

See JUDGE.

## LEX FORI.

In an action by a foreign administratrix, it appeared of record that she had married since administration granted. *Held*, that it was to be presumed that her authority was not affected by the marriage, such being the law of the State where the action was brought. — *Kansas Pacific Railway Co. v. Cutter*, 16 Kans. 568.

## LIEN.

A lien on a vessel, given by statute in certain cases, attaches only if notice thereof is filed, as prescribed by the statute, "within four days from the time such vessel shall depart from port." *Held*, that notice filed before the vessel's departure was sufficient. — *Young v. The Orpheus*, 119 Mass. 179.

See ATTACHMENT, 1; BANKRUPTCY.

LIFE INSURANCE. — See INSURANCE (LIFE).

## LIMITATIONS, STATUTE OF.

1. Defendant was summoned as garnishee of plaintiff in an action brought by a third party, and by his answer admitted that he owed money to plaintiff. *Held*, that plaintiff could not, in an action brought by him against defendant, avail himself of this admission, to avoid the bar of the statute. — *Sibert v. Wilder*, 16 Kans. 176.

2. A promissory note dated Dec. 24, 1867, was payable one year from date and not entitled to grace. *Held*, that the maker had the whole of the day when it fell due in which to pay it, at least in the absence of evidence of an express demand and refusal of payment on that day; and, therefore, that an action on it brought Dec. 24, 1874, was not barred by a six years' limitation. — *Beeman v. Cook*, 48 Vt. 201.

## LORD'S DAY.

1. A bail-bond executed on Sunday is valid. — *Salter v. Smith*, 55 Ga. 244.  
 2. A letter containing the acceptance of an offer of sale was written on Saturday, and on Sunday handed to a messenger, to be carried to the mail the

next day; which was done. *Held*, that a valid contract was completed. — *Bryant v. Booze*, 55 Ga. 438.

3. A person walking about a mile in a town for exercise on Sunday, *held* not a traveller in such a sense as to bar his recovery against the town for injuries suffered during such walk from a defect in the highway. — *O'Connell v. Lewiston*, 65 Me. 34.

MANDAMUS. — See ELECTION.

MARINE INSURANCE. — See INSURANCE (MARINE).

MARRIAGE. — See BIGAMY; *LEX FORI*.

MASTER AND SERVANT.

The servant of a railroad company sought to recover of the company damages for injury suffered by him in an accident which was caused by the company's negligence in not providing its cars with check-chains. *Held*, that if he was of opinion that cars without check-chains were dangerous, and knew that some of the company's cars did not have them, and did not notice, before the accident, whether the car in which he was riding had them or not, he could not recover. — *Ladd v. New Bedford R.R. Co.*, 119 Mass. 412.

See MUNICIPAL CORPORATION, 1; RECEIVER.

MEASURE OF DAMAGES. — See DAMAGES.

MERGER. — See DOWER; STOCK.

MINE.

The owner of a coal-mine in working it removed the "ribs" of coal by which its roof was supported, whereby water from the surface flooded his mine, and from thence the mine of an adjoining owner. *Held*, that he was liable for the damages, though he had worked according to the usages of miners, and without negligence. (WILLIAMS and MERCUR, JJ., dissenting.) — *Horner v. Watson*, 79 Penn. St. 242.

MISDEMEANOR. — See FELONY.

MISNOMER. — See NAME.

MONEY. — See VARIANCE, 2.

MONEY HAD AND RECEIVED. — See DAMAGES, 2; INSURANCE (FIRE), 1.

MORTGAGE.

A mortgage recited that the mortgagee had indorsed certain promissory notes made by the mortgagor, which were described, and that "it was a condition precedent, which condition has induced" the mortgagee to indorse those notes, that the mortgage should be made "to secure him from any loss he may sustain by the non-payment by" the maker of the notes at maturity; was conditioned to be void if the mortgagor should pay or cause to be paid the said notes "at their maturity respectively to the holder or holders of them," or in case the mortgagee should be compelled to pay said notes, and the mortgagor should repay to him the amount; contained a power of sale; provided that in case of a sale the proceeds should "be applied to the payment of all claims of said mortgagee" under the mortgage, whether then or thereafter payable; and contained a covenant to insure for "the benefit of said mort-

gagee." *Held*, that the mortgage was not merely an indemnity to the indorser, but a security for the payment of the notes; that any *bona fide* holders of the notes might maintain a suit to foreclose it; and that their rights were not affected by the release of the mortgagee. (STEWART, J., dissenting.) — *Boyd v. Parker*, 43 Md. 182.

See INSURANCE (FIRE), 1; JUDGMENT, 2.

#### MUNICIPAL CORPORATION.

1. The selectmen of a town employed a person as nurse in a small-pox hospital established by the town, and suffered him to depart without being properly disinfected, whereby plaintiff caught the disease from him. *Held*, that the town was not liable. — *Brown v. Vinalhaven*, 65 Me. 402.

2. Where a municipal corporation is authorized to issue bonds, under certain conditions (as a popular vote of approval), of whose performance the municipal officers are judges, and does issue bonds executed in proper form by the municipal officers, and reciting compliance with the conditions, such bonds are valid in the hands of *bona fide* holders, though the conditions have not in fact been complied with. (MILLER, DAVIS, and FIELD, JJ., dissenting.) — *Coloma v. Eaves*, 92 U. S. 484; *Venice v. Murdock*, id. 494; *Moultrie Co. v. Rockingham Savings Bank*, id. 631; *Marcy v. Oswego*, id. 637; *Humboldt v. Long*, id. 642. s. p. *Vicksburg v. Lombard*, 51 Miss. 111.

See ATTORNEY, 1; BY-LAW; EVIDENCE, 6; INJUNCTION, 2.

#### MURDER.

Indictment for murder by stabbing, laying a sufficient venue for the blow, but none whatever for the death, *held*, good. — *State v. Bowen*, 16 Kans. 475.

See NEW TRIAL.

#### NAME.

1. In a prosecution for assault on George W. Shott, the proof was of an assault on George Shott. *Held*, that, as a man can have but one Christian name, the W. might be rejected as surplusage, and there was no variance. (PETTIT, J., dissenting.) — *Choen v. The State*, 52 Ind. 347.

2. The attachment of the land of Henry M. Hawkins, on a writ against Henry F. Hawkins, is void; and though the sheriff return on the writ that he has duly certified the attachment to the registry, as required by law, the return may be contradicted by producing the certificate bearing a wrong name. — *Dutton v. Simmons*, 65 Me. 583.

#### NEGLIGENCE.

Plaintiff went by night to defendant's house to buy some oats, which defendant agreed to sell as an accommodation, though he had none which he wished to sell. They went together to defendant's barn where the oats were kept, and while defendant was seeking a measure, plaintiff walked about the barn in the dark, fell through a hole in the floor, and was injured. *Held*, that defendant was not liable. — *Pierce v. Whitcomb*, 48 Vt. 127.

See ACTION, 1; DAMAGES, 1; EVIDENCE, 6; MASTER AND SERVANT; MINE; MUNICIPAL CORPORATION, 1; RECEIVER; SHIP; VARIANCE, 1.

NEGOTIABLE INSTRUMENTS. — See BILLS AND NOTES.

## NEW TRIAL.

A statute enacted that "the granting of a new trial places the parties in the same position as if no trial had been had." *Held*, that it could not constitutionally be construed to authorize a conviction of murder in the first degree at a new trial granted to a prisoner convicted of murder in the second degree on an indictment sufficient to support a conviction of either offence. — *Johnson v. The State*, 29 Ark. 31.

See REMOVAL OF SUITS, 1; TRIAL, 1.

## NUISANCE.

Plaintiffs built a house, and planted ornamental trees and shrubs, on land adjoining that used by defendant for burning bricks. The fumes from the brick-kiln, when blown by the wind toward plaintiffs' land, greatly injured the vegetation on it. *Held*, a nuisance, restrainable by injunction. — *Campbell v. Seaman*, 63 N. Y. 568.

See MINE.

## OFFICER.

Where the General Assembly has, by the Constitution, exclusive jurisdiction to determine contested elections for an office, a claimant of the office cannot, before his right has been adjudged by the Assembly, maintain an action at law against the officer *de facto*, to recover the official salary. — *Baxter v. Brooks*, 29 Ark. 173.

See NAME, 2.

ORDINANCE. — See BY-LAW; EVIDENCE, 6; INJUNCTION, 2.

## PARENT.

The mother and step-father of a widow took her into their house and treated her as a member of the family for more than a year, when she died. *Held*, that they could not recover of her administrator the expenses of her maintenance, without proof of further facts, showing a contract or understanding that they were to be paid by her. — *Barnhill v. Kirk*, 44 Tex. 589.

See ADOPTION.

PARTIES. — See ATTORNEY, 2; GUARDIAN; JUDGMENT, 2.

## PARTNERSHIP.

By agreement of partnership among four persons to carry on a commission business, two were to contribute the whole capital in unequal shares, and to receive interest thereon; one of these two was to devote to the business "such time as he may be able to give;" the other three partners were to give all their time; and net profits were to be shared equally. On a dissolution, the business of the firm was found to have resulted in a loss of capital, and one partner was insolvent. *Held*, that the loss must be borne equally by the other three. — *Whitcomb v. Converse*, 119 Mass. 38.

See ATTORNEY, 2.

PART-OWNER. — See SHIP.

## PARTY-WALL.

Action to recover half the value of a party-wall, built by plaintiff, with-

out any express agreement with defendant, on the line between their estates. *Held*, that if the jury found that plaintiff built the wall expecting to be paid for it, and that defendant had reason to know of such expectation, and allowed plaintiff to build without objection, they might infer a promise by defendant to pay plaintiff. — *Day v. Caton*, 119 Mass. 513.

PASSENGER. — See CONSTITUTIONAL LAW, 7; DAMAGES, 1; RAILROAD.

PATENT. — See CONSTITUTIONAL LAW, 2.

PAYMENT. — See CHECK; EXECUTOR.

PERJURY. — See JURISDICTION, 1.

PLEADING. — See INSURANCE (FIRE), 8; VARIANCE.

PRACTICE. — See APPEAL; CORPORATION, 1; TRIAL.

#### PRESUMPTION.

In ejectment, the plaintiff relied on the presumption of a lost grant from the government to his ancestor, who was an alien. *Held*, that he was bound to show affirmatively that his ancestor had license to purchase and hold, and that this fact could not be presumed. — *Sulphen v. Norris*, 44 Tex. 204.

See LEX FORI.

PRINCIPAL AND AGENT. — See AGENT.

PRINCIPAL AND SURETY. — See SURETY.

PRIORITY. — See CONFLICT OF LAWS.

PRIVILEGED COMMUNICATION. — See ACTION, 2.

PROBATE. — See REMOVAL OF SUITS, 2.

PROCHIEIN AMY. — See GUARDIAN.

PROMISSORY NOTE. — See BILLS AND NOTES.

#### RAILROAD.

Plaintiff was a passenger on defendants' cars. A conductor took a coupon from his ticket, and gave him instead a conductor's check, leaving him also his ticket with its other coupons attached. Before arriving at the point to which the check took him, another conductor took the train, and demanded of plaintiff the check, and refused to let him ride on his ticket; and plaintiff being unable to find his check, the conductor ejected him at a station, without unnecessary force. *Held*, that defendants were justified. — *Jerome v. Smith*, 48 Vt. 230.

See CORPORATION, 2; DAMAGES, 1; MASTER AND SERVANT; RECEIVER.

#### RECEIVER.

No action lies against a receiver in possession of a railroad for negligence of an employe of the road, causing damage to the plaintiff. (CHURCH, C. J., dissenting.) — *Cardot v. Barney*, 63 N. Y. 281.

RECORD. — See EVIDENCE, 3.

REGISTRY. — See ATTACHMENT, 2; DEED; NAME, 2.

RELIGIOUS SOCIETY. — See CHARITY, 1; TRUST, 1.

REMAINDER. — See DEVISE, 1, 2.

## REMOVAL OF SUITS FROM STATE TO UNITED STATES COURTS.

1. After a cause has been once tried in a State court, and a new trial granted, it may be removed into the United States Circuit Court. — *Rosenfield v. Condict*, 44 Tex. 464.

2. A suit in a State court of probate to revoke probate of a will, held, removable into the Circuit Court of the United States. (WAITE, C. J., SWAYNE, and BRADLEY, JJ., dissenting.) — *Gaines v. Fuentes*, 92 U. S. 10.

REPEAL. — See CORPORATION, 1.

RETURN. — See NAME, 2.

REVERSION. — See FORFEITURE.

RIGHT TO BEGIN. — See TRIAL, 4.

ROBBERY. — See INDICTMENT, 1.

RULE IN SHELLEY'S CASE. — See DEVISE, 1, 2.

SALE. — See GUARANTY; ILLEGAL CONTRACT, 1; VENDOR AND PURCHASER.

## SCHOOL.

Under the Constitution and laws of Vermont, it was held that the children of Papists might lawfully be excluded from a public school, for absence contrary to the rules thereof, though such absence was pursuant to the direction of their parents and their priest, for the purpose of attending religious services on a feast-day of the church. — *Ferriter v. Tyler*, 48 Vt. 444.

SERVICE. — See CORPORATION, 1.

SET-OFF. — See ARBITRATION.

## SHIP.

Where damage is done to a vessel by another, through the fault or negligence of the master of the latter vessel, who controls her and is sailing her "on shares," her general owners are not liable. — *Somes v. White*, 65 Me. 542.

## SOVEREIGN.

The county of Alexandria, formerly part of the District of Columbia, was in 1846 ceded by the United States to Virginia, and both governments have ever since treated the cession as valid, and jurisdiction has been *de facto* exercised accordingly. Held, that a resident of the county could not resist payment of taxes to the State of Virginia, on the ground that the cession was invalid. — *Phillips v. Payne*, 92 U. S. 130.

STATUTE. — See CONSTITUTIONAL LAW; CONSTITUTIONAL LAW, STATE, 7; CORPORATION, 1; NEW TRIAL.

STATUTE OF FRAUDS. — See TRUST, 2.

STATUTE OF LIMITATIONS. — See LIMITATIONS, STATUTE OF.

## STOCK.

The purchase by a corporation of its own stock is not a merger of the stock, unless such is the intent of the corporation; and the corporation may

sell such stock again to whom it will, and is not bound to offer the same to the other stockholders proportionally. — *State v. Smith*, 48 Vt. 266.

#### SUBROGATION.

Judgment was recovered against three joint sureties on a bond, and execution was levied on the lands of all. Two of them paid the amount due. *Held*, that the execution was not thereby discharged, but that the two sureties who had paid were entitled in equity to be subrogated to the levy on the lands of their co-surety. — *Smith v. Rumsey*, 83 Mich. 183.

SUNDAY. — See LORD'S DAY.

#### SURETY.

One of several sureties for a debt notified the creditor, on the maturity of the debt, to sue the principal debtor within thirty days; which he failed to do, whereby, by statute, the surety was discharged. *Held*, that his co-sureties, who had given no notice, remained liable. — *Wilson v. Tebbets*, 29 Ark. 579.

See ACT OF GOD; SUBROGATION.

TAX. — See BY-LAW; CONSTITUTIONAL LAW, 7; CORPORATION, 3; INJUNCTION, 1, 3; SOVEREIGN.

TENANT FOR LIFE. — See DEVISE, 1, 2; FORFEITURE.

TORT. — See ACTION, 1; JOINT TORTFEASORS.

TRESPASS. — See DAMAGES, 5.

#### TRIAL.

1. A verdict of guilty in a capital case was received, and the jury discharged, in the absence of the prisoner, who was confined in jail. *Held*, that he had been once in jeopardy, and could not be tried again for the same offence. — *Nolan v. The State*, 55 Ga. 521.

2. It is not necessary that a prisoner convicted even of felony, if not capital, should be asked before judgment what he has to say why sentence should not be pronounced. — *Jones v. The State*, 50 Miss. 718.

3. A criminal trial was begun before four justices, the presence of three being necessary duly to constitute the court. During one whole day of the trial, which lasted several days, one of the justices was absent. *Held*, that he was disqualified from further sitting on that trial, and that, although he had returned, the subsequent departure of another justice before a verdict was rendered, left no competent court to receive the verdict. — *People v. Shaw*, 63 N. Y. 36.

4. A decision of the judge at *nisi prius* on the right to open and close to the jury, is not reviewable on error. — *Hall v. Weare*, 92 U. S. 728; *White v. Carlton*, 52 Ind. 371. *Contra*, *Tobin v. Jenkins*, 29 Ark. 151.

See NEW TRIAL.

TROVER. — See DAMAGES, 3.

#### TRUST.

1. The owner of land, by deed reciting that a meeting-house was being erected on it, conveyed it "in trust for the members of the Methodist Church,



according to the rules of the discipline," of that church. The trustees afterwards sold the property, and invested the proceeds in a new meeting-house, which proceeding was conformable to the discipline of the church. *Held*, that it was no violation of the trust. (PEYTON, C. J., dissenting.) — *Kilpatrick v. Graves*, 50 Miss. 432.

2. It was verbally agreed between A. and B. that A. should buy land from a trustee to whom B. had conveyed it in trust to secure a debt, and should hold the title as security for the purchase-money paid by him. A. accordingly bought the land, afterwards sold it, and promised to pay over the proceeds to B., but failed to do so. *Held*, that a valid trust was created (the 7th section of the English Statute of Frauds not being in force in Virginia); and that equity had jurisdiction of a suit by B. against A. to recover the proceeds of the land. — *Nease v. Capehart*, 8 W. Va. 95.

See CHARITY, 1, 2; JURISDICTION, 2.

TRUSTEE PROCESS. — See FOREIGN JUDGMENT; LIMITATIONS, STATUTE OF, 1.

#### ULTRA VIRES.

1. The officers of a corporation cannot, without special authority, bind the corporation by a promise to pay the debts of another corporation. — *Rahm v. King Bridge Manufactory*, 16 Kans. 277; *Ehrgott v. Same*, id. 486.

2. Action by a corporation to recover the price of goods sold and delivered. *Held*, no defence that the corporation was not authorized by its charter to deal in such goods. — *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

See BY-LAW; CORPORATION, 2; MUNICIPAL CORPORATION, 2.

USAGE. — See MINE.

USURY. — See BILLS AND NOTES.

VAGRANT. — See CONSTITUTIONAL LAW, 3.

#### VARIANCE.

1. In an action against a surgeon, the declaration was for damages suffered from his want of ordinary care and skill in treating a fracture. *Held*, that evidence that the defendant professed to have extraordinary skill and to warrant a cure was irrelevant. — *Goodwin v. Hersom*, 65 Me. 223.

2. An indictment for embezzling money is not sustained by proof of embezzling bills of National Banks. — *Block v. The State*, 44 Tex. 620.

3. The declaration on a policy of insurance set forth that the insurance was in force "from the 6th day of January, 1870, until the 6th day of January, 1871;" and was payable sixty days after proof of loss; by the policy produced at the trial it appeared that the insurance was "from the 6th day of January, 1870, at noon, to the 6th day of January, 1871, at noon;" and was payable sixty days after proof was received by the insurers, and excepted the insurers from liability in certain cases not set forth in the declaration. *Held*, material variances. — *Simmons v. [West Virginia] Insurance Co.*, 8 W. Va. 474.

See NAME, 1.

## VENDOR AND PURCHASER.

One who has agreed to sell land incumbered only by a mortgage for a certain sum can maintain no action at law against the purchaser for refusing to complete the purchase, if the land is in fact mortgaged for a greater sum, though he tenders with the deed the difference in money between the sums. — *Brigham v. Townsend*, 119 Mass. 287.

See CONTRACT; DAMAGES, 2.

VENDOR'S LIEN. — See BANKRUPTCY.

VENUE. — See MURDER.

VERDICT. — See JURY; TRIAL, 1.

VOTER. — See CONSTITUTIONAL LAW, 5, 6; ELECTION.

WAR. — See CONSTITUTIONAL LAW, 1.

WARRANTY. — See INDORSER.

WATERCOURSE. — See DAMAGES, 4.

WAY. — See EVIDENCE, 6; LORD'S DAY, 3.

WIDOW. — See DOWER.

WILL. — See CHARITY, 2; DEVISE; REMOVAL OF SUITS, 2.

## WITNESS.

A defendant in a criminal case, who is a witness at his own request, cannot refuse to answer questions put on cross-examination, to discredit his direct evidence, on the ground that answering would criminate himself. — *State v. Wentworth*, 65 Me. 234.

## WORDS.

"*Forfeiture beyond his natural Life.*" — See FORFEITURE.

"*Money.*" — See VARIANCE, 2.

"*Traveller.*" — See LORD'S DAY, 3.

"*Within four Days from the Time.*" — See LIEN.

## DIGEST OF CASES IN BANKRUPTCY.

[The present number of the Digest contains decisions published in the National Bankrupt Register from Nos. 6 to 12 inclusive of Vol. 13, all of Vol. 14, and some decisions from the State Courts.]

ACKNOWLEDGMENT. — See NOTARY PUBLIC, 1.

## ACTIONS.

1. It is not the purpose of the Bankrupt Act to abate suits commenced before bankruptcy in which the title to the property surrendered by the bankrupt is in litigation. — *Hewett v. Norton*, 13 N. B. R. (La. C. Ct.) 276.

2. If a loan is made for the use of a firm, and the note of a partner is accepted therefor, no action can be maintained upon it against the firm. — *In re Herrick*, 13 N. B. R. (N. D. N. Y.) 312.

3. But, having obtained judgment against one partner, he cannot maintain any action against the other upon such note, although he was ignorant that the money loaned was for the use of the firm. — *Ibid.*

4. A creditor of a corporation may prosecute his action for balance of claim after proof in bankruptcy and receipt of dividend thereon. — *New Lamp Chimney Co. v. Ansonia Brass and Copper Co.*, 13 N. B. R. (U. S. Sup. Ct.) 385.

5. Under the Bankrupt Act of March 2, 1867, an assignee in bankruptcy, without regard to the citizenship of the parties, could maintain a suit for the recovery of assets, in a court of the United States in a district other than that in which the decree of bankruptcy was made. — *Lathrop v. Drake*, 13 N. B. R. (U. S. Sup. Ct.) 472.

6. If an assignee upon sale of property refuses to deliver it, he is liable to an action at law in the State court for conversion, if the bankrupt court has not acted upon the matter of the sale, or had its attention called to it in any manner. — *Ives v. Tregent*, 14 N. B. R. (Sup. Ct. Mich.) 60.

7. Proof of debt in bankruptcy does not preclude the creditor from subsequently maintaining an action upon the same. — *Miller v. O'Kain*, 14 N. B. R. (Sup. Ct. N. Y.) 145.

See PARTNERSHIP, 1; RECEIVER, 7.

## ACT OF BANKRUPTCY.

1. Payments made when the debtor is insolvent, though made in the ordinary course of business, are acts of bankruptcy. — *In re Oregon Bulletin, &c. Co.*, 13 N. B. R. (Oregon Dist.) 503.

2. A deposition in proof of the act of bankruptcy in making a fraudulent conveyance is insufficient, if it fails to allege or show that it was made with a fraudulent intent upon the part of the debtor. — *Cunningham v. Cady*, 13 N. B. R. (W. D. Ohio) 525.

3. Petitioning creditors cannot set up as an act of bankruptcy the non-payment of a note, when they have taken an assignment of all the assets of the

debtor intended as a preference, and depriving him of the means of paying the note. — *In re Williams*, 14 N. B. R. (E. D. Mich.) 182.

4. It is not an act of bankruptcy for a debtor who purchases gold certificates, with the overdrafts on a bank, to transfer the certificates to the bank, if there was an agreement between him and the bank that they should remain the property of the bank, or if he obtained them with a preconceived idea of retaining them and defrauding the bank. — *Payne v. Solomon*, 14 N. B. R. (N. Y. S. Dist.) 162.

5. A general assignment for the benefit of creditors equally, is an act of bankruptcy and void under the statutes. — *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 N. B. R. (N. D. Ohio C. Ct.) 311.

6. An insane person cannot commit an act of bankruptcy. — *In re Weitzel*, 14 N. B. R. (W. D. Wis.) 466.

See ESTOPPEL, 1.

#### ADJUDICATION.

1. It is no ground for setting aside an adjudication of bankruptcy, that the bankrupt aided and assisted and solicited creditors to join in the petition. — *In re Duncan*, 14 N. B. R. (S. D. N. Y.) 18.

2. An adjudication will not be set aside, and the proceedings vacated and dismissed on motion, upon the ground that the requisite proportion in number and value of the creditors did not join in the petition. Fraud, bad faith, or collusion must be shown. — *In re Funkenstein*, 14 N. B. R. (Cal. Dist.) 213.

See ATTACHING CREDITORS, 1, 2; CASE, 1; EVIDENCE, 4; PRACTICE, 2.

#### AFFIDAVIT.

No inquiry, as to any facts set forth in an affidavit presented to the court, to satisfy it that the requisite proportion of creditors had signed the petition, will be permitted after the adjudication, unless fraud or bad faith be alleged. — *In re Duncan*, 14 N. B. R. (S. D. N. Y.) 18.

AFTER-ACQUIRED PROPERTY. — See MORTGAGE, 11.

#### AGENT.

Where a person left a claim for collection with a collection agency, which was forwarded by it to an attorney, who knowing the debtor's bankrupt condition procured a confession of judgment, obtained the funds and sent them to the collection agency, but they never were received by the creditor, the attorney is not the agent of the creditors, so as to make them chargeable with his knowledge of the debtor's condition. — *Hoover v. Wise*, 14 N. B. R. (Sup. Ct. U. S.) 264.

See PROOF, 8, 18.

ALIEN. — See PREFERENCE, 12.

#### AMENDMENT.

1. The amendments of 1874, so far as they change the existing law in reference to the rights of assignees to recover property transferred in contravention of the Bankrupt Act and in reference to the proof of debts by creditors who have taken a preference, are not retroactive and do not apply where the proceedings in bankruptcy had been previously commenced. — *In re Lee*, 14 N. B. R. (N. D. N. Y.) 89.

2. The amendment to § 39 of the Act substituting the word *know* for *having reasonable cause to believe*, is not to be applied to cases in bankruptcy instituted prior to Dec. 1, 1873. — *Tinker v. Van Dyke*, 14 N. B. R. (U. S. C. Ct. E. Dist. Mich.) 112.

See CONSTRUCTION, 1; PETITION, 7; PRACTICE, 8.

#### APPEAL.

1. A compliance with Rule 26, in relation to the time of filing an appeal in the Circuit Court, is not necessary to give the court jurisdiction. The rule is merely directory. — *Barron v. Morris*, 14 N. B. R. (W. D., Tex. C. Ct.) 371.

2. What is required to be filed in the Circuit Court within ten days from the time of taking the appeal, is the appeal containing a statement of the appellant's claim, and a brief account of what has been done in the District Court and the grounds of the appeal, and not a transcript of the proceedings in the District Court. — *Ibid*.

See JUDGMENT, 4.

#### ASSENT.

1. A partner who is brought into bankruptcy upon the petition of his co-partner must procure the assent of creditors to obtain his discharge or pay the required percentage. — *In re Wilson*, 13 N. B. R. (Mass. Dist.) 253.

2. The fact that the debtor assented to the assignment of claims against him after the commission of an act of bankruptcy, but before the filing of the petition, does not confer any greater or better rights upon the assignee. — *Rollins v. Twichell*, 14 N. B. R. (Me. Dist.) 201.

See PROMISSORY NOTE, 3.

#### ASSETS.

1. If there is a formal dissolution of partnership, and the retiring partner allows his name to be continued in the business by the other partner, his trade assets are to be treated as joint assets. — *In re Morse*, 13 N. B. R. (Mass. Dist.) 376.

2. Joint creditors of the retiring partner cannot share his separate estate, until his separate creditors have been paid in full. — *Ibid*.

#### ASSIGNEE.

1. No general order appointing a named person assignee in a class of many cases could be made under § 13 of the Act. It is expressly forbidden by Rule IX. The order should at least enumerate the particular cases in which the person is intended to be appointed. — *Ex parte Bryan*, 14 N. B. R. (E. D. Va.) 71.

2. The court will require such assignee to specially qualify in each case, before being treated as such. — *Ibid*.

3. But where an assignee so appointed does any act as assignee, and was recognized and held out as such by the court, his action, in that particular matter, must be held valid, it being similar in nature to the act of an executor *de son tort*. — *Ibid*.

4. An assignee is not subject, as of course, to an examination by any cred-

itor, whenever the latter may desire it, but will be protected from unnecessary annoyance by refusing an application for his examination, unless upon some issue regularly referred to the register. — *In re Smith*, 14 N. B. R. (N. D. N. Y.) 432.

5. The assignee may be subpoenaed and required to testify in the same manner as any other witness, and the register has authority to make the requisite order. — *Ibid*.

See ACTION, 5, 6; AUCTION SALE; BILL OF SALE, 3; COMPOSITION, 5; DIVIDEND; JURISDICTION, 11; MARSHAL, 3; PRACTICE, 13; PROOF, 19; REGISTER, 3, 4; RECEIVER, 3, 7.

#### ASSIGNMENT.

1. All persons claiming the benefit of an assignment to trustee for the benefit of creditors are chargeable with knowledge of the terms thereof, and consequently with knowledge of the insolvency of the debtor and his purpose to evade the operation of the Bankrupt Law. — *Jackson v. McCulloch*, 13 N. B. R. (W. D. Tex.) 283.

2. A claim for damages for loss sustained by capture or destruction by a rebel cruiser may be assigned; and, if properly made, equity will sustain the transfer. — *Williamson v. Colcord*, 13 N. B. R. (Me. Dist.) 319.

3. An assignment by an insolvent debtor of his property to trustees for the equal and common benefit of all his creditors is not fraudulent; and, when executed six months before proceedings in bankruptcy are taken against the debtor, is not assailable by the assignee in bankruptcy subsequently appointed; and the assignee is not entitled to the possession of the property from the trustees. — *Mayer v. Hellman*, 13 N. B. R. (Sup. Ct. U. S.) 440.

4. A State statute providing for the equal distribution of the assets of an insolvent corporation is suspended during the existence of the general bankrupt law, and a deed of assignment therefore under such State law is void. — *Shryock v. Bashore*, 13 N. B. R. 481.

5. A general assignment by a partner of his individual property for the equal benefit of his individual creditors first, and the excess, if any, to be applied to the payment of his partnership creditors, was made Jan. 31, 1874; proceedings in bankruptcy June 3, 1874. *Held*, that the same would be set aside as fraudulent under the six months clause of § 35, and that, the adjudication having been made June 12, the amendment of June 22 did not apply. — *Barnwell v. Jones*, 14 N. B. R. (S. D. Ala.) 278.

6. The title to the real estate of a bankrupt passes to his assignee, and a bill to enforce the vendor's equitable lien cannot be maintained against the bankrupt. — *Pearce v. Foreman*, 29 Ark. 563.

See INSURANCE; PETITION, 1.

#### ATTACHING CREDITOR.

1. An attaching creditor has a right to intervene and contest an adjudication upon the merits as well as upon the jurisdiction of the court. — *In re Williams*, 14 N. B. R. (E. D. Mich.) 132.

2. Attaching creditors may intervene and oppose an adjudication, as well

as to numbers and amount of creditors as to any other material fact. — *In re Scrafford*, 14 N. B. R. (Kan. Dist.) 184.

See INVOLUNTARY PETITION, 6; MORTGAGE, 2; PLEADINGS, 2; PRACTICE, 2.

#### ATTACHMENT.

1. An attachment upon mesne process is nowhere declared a fraud upon the act. It continues in force till the assignment, and only fails in case the assignment is made in proceedings commenced within the four months. — *Whitked v. Pillsbury*, 13 N. B. R. (Me. D.) 241.

2. An attachment made within four months next preceding the commencement of proceedings in bankruptcy is dissolved thereby, but if made by garnishee process before that time it is not dissolved, but constitutes a lien. — *Hatch v. Seely*, 13 N. B. R. (Sup. Ct. Iowa) 380.

3. The debt of a creditor, who has made an attachment within four months of the bankruptcy proceedings, is extinguished by a composition, and the attachment is dissolved. — *Smith v. Engle*, 14 N. B. R. (Sup. Ct. Iowa) 481.

4. The court upon motion will quash an attachment made within four months of the filing of the petition in bankruptcy, if a composition has been confirmed and recorded, because the debt is thereby extinguished. — *Miller v. Mackenzie*, 13 N. B. R. (Md. Ct. Appls.) 496.

5. An attachment of property, which became exempt afterwards, but before proceedings in bankruptcy were begun, is not dissolved by the assignment. A lien was created which State laws may enforce. — *Robinson v. Wilson*, 14 N. B. R. (Sup. Ct. Kan.) 565.

See COMPOSITION, 24; COSTS, 2; RECEIPTOR, 1, 2.

#### ATTORNEY.

1. There is no incompatibility in the same person appearing as attorney for the debtor upon the record, and also as attorney in fact, authorized to compromise as a special ministerial duty, — that of signing the deed of compromise for the sum named in the power of attorney itself. — *In re Weber Furniture Co.*, 13 N. B. R. (E. D. Mich. C. Ct.) 559.

2. A deponent cannot authorize an attorney to alter a sworn paper. — *In re Walther*, 14 N. B. R. (E. D. Mich.) 273.

See EVIDENCE, 9; FIDUCIARY DEBT, 1.

#### AUCTION SALE.

If an auction sale is fairly made, and the bids understood by the by-standers and the auctioneer, it is valid, and the assignee's inattention and consequent misapprehension are no reasons for avoiding it. — *Ives v. Tregent*, 14 N. B. R. (Sup. Ct. Mich.) 60.

#### AWARD.

A bankrupt in a collateral matter is bound by the award of a register to whom he submitted the controversy as an arbitrator. — *Johnson v. Worden*, 13 N. B. R. (Sup. Ct. Vt.) 335.

BANKRUPT.—See WITNESS, 2.

BANKRUPT ACT.—See CORPORATION, 1.

BANKRUPTCY.

A person who, having ceased to be a trader, gives a note and suspends payment on it, does not commit an act of bankruptcy, even though the debt for which the note was given was contracted while he was a trader. — *In re Jack*, 13 N. B. R. (N. D. Ga.) 296.

BILL OF SALE.

1. A bill of sale by the law of Massachusetts, though unattended by possession of the property, and though not placed upon record, vests a complete title in the creditor, subject only to be defeated by the discharge of the debt or by some intervening right before possession taken, and takes effect from the time of its execution. — *Sawyer v. Turpin*, 13 N. B. R. (U. S. S. Ct.) 271.

2. And constitutes a sufficient consideration for a mortgage, though there was an agreement that it should not be recorded and should be kept secret. — *Ibid*.

3. If the vendor in a bill of sale represents himself as of a particular place, and the vendee thus records it, the assignee is bound by it and cannot set it aside by showing a different residence. — *Allen v. Whittemore*, 14 N. B. R. (Dist. Vt.) 189.

BOND. — See COMPOSITION, 22; JUDGMENT, 2.

BOOKS OF ACCOUNT.

The duty of keeping proper books of account, as a prerequisite to a discharge under the Bankrupt Act, is imposed upon a certain class of persons as such, and ought to be confined to those who actually belong to that class with some degree of permanence, the failure to do so being penal. — *In re Coté*, 14 N. B. R. (Mass. Dist.) 503.

BREACH OF TRUST. — See DISCHARGE, 3.

BURDEN OF PROOF.

1. The burden of proof, upon an involuntary petition, is upon the petitioning creditors. — *In re Oregon Bulletin, &c., Co.*, 13 N. B. R. (Oregon Dist.) 503.

2. They are not required to make that full and complete proof as to insolvency as they would be of an ordinary issue. But if they offer testimony tending to show the insolvency of the debtor and his inability to pay his debts, it is for the debtor to explain, if he can, he knowing best his condition. — *Ibid*.

3. In a petition for adjudication, the burden is upon the defence to show, by a fair preponderance of evidence, that certain gold certificates passed to the bank by defendant belonged to it by reason of his taking them with a preconceived idea of not paying for them, and, also, to identify the certificates. — *Payne v. Solomon*, 14 N. B. R. (N. Y. Dist.) 162.

4. In a suit by an assignee to recover the value of property alleged to have been sold in fraud of the bankrupt, the burden of proof is throughout upon the plaintiff, but the intent of the parties may be inferred from their acts. — *Parsons v. Topfiff*, 14 N. B. R. (119 Mass. 245) 547.

See PROOF, 5.



## CASE.

1. The proceeding by a creditor to have a debtor adjudged a bankrupt is a case within the ordinary meaning of the term, and terminates with the judgment that the debtor is or is not a bankrupt; the subsequent proceedings in the court as to the settlement and distribution of the bankrupt estate being only consequences and incidents of such judgment. — *In re Oregon Bulletin Printing and Publishing Co.*, 14 N. B. R. (U. S. C. Ct.) 394.

2. Such case, after final judgment in the District Court, can be reviewed in the Circuit Court. If it has been tried by a jury, it can be reviewed only upon a writ of error. — *Ibid.*

CHOSSES IN ACTION. — See SET-OFF, 3.

CLAIM. — See DISCHARGE, 3; CREDITORS, 2; REGISTER, 2.

## COLLATERALS.

The United States may resort to its debtors for the priority of their claims before applying their collaterals. — *Lewis v. United States*, 14 N. B. R. (U. S. S. Ct.) 64.

## COMMERCIAL PAPER.

Notes given by one partner to his co-partner upon dissolution, in consideration of the transfer of his interest in the concern as manufacturers, and for all balances against him, are not the commercial paper of a manufacturer within the meaning of the bankrupt law, issued in the course of his business. — *In re Lanz*, 14 N. B. R. (Minn. Dist.) 159.

## COMPOSITION.

1. A resolution of composition providing for a payment in indorsed promissory notes of the debtor is valid, and will be recorded. — *In re Hurst*, 13 N. B. R. (E. D. Mich.) 455.

2. Unless the amount agreed upon is actually paid, the composition will not be effective to discharge the debtor. — *Ibid.*

3. The determination of the District Court that the requisite proportion of creditors have confirmed a resolution for composition is conclusive and cannot be impeached collaterally. — *Smith v. Engle*, 14 N. B. R. (Sup. Ct. Iowa) 481.

4. And equally conclusive and unimpeachable is the finding of the court that a resolution to pay the percentage in notes is valid. — *Ibid.*

5. And that a statement of debts sufficiently states the address of the creditor. — *Ibid.*

6. The recording of the decree of the court containing the resolution is sufficient, and, when the decree directs the statement of assets and debts to be filed, the presumption — nothing appearing to the contrary — is that it was done as directed. — *Ibid.*

7. Where there are no defects in a composition proceeding, a discharge, though unnecessary and unavailing, works no prejudice to the opposite party. — *Ibid.*

8. The District Court, having acquired jurisdiction over the subject-matter and of the parties, had the right to pass upon the sufficiency of the subsequent notice of the hearing whether the resolution had been properly passed, and an

erroneous determination upon that question is binding until reversed by some direct proceeding. It does not render the entire action of the court void and subject to collateral attack. — *Ibid.*

9. When the bankrupt and the requisite number of creditors sign a paper agreeing to the terms of a composition, it is sufficient, though the signatures are not attached to the resolution. — *Ibid.*

10. The provisions of the bankrupt law in regard to composition apply equally as well to corporations as to natural persons. — *In re Weber Furniture Co.*, 13 N. B. R. (E. D. Mich.) 529.

11. In a proposed composition, the court may take into consideration any fact tending to show that the creditor was influenced by friendly feelings, or by any other motives than those which usually actuate creditors in endeavoring to make the best terms with a debtor to whose personal responsibility they have trusted. — *Ibid.*

12. Where a resolution for composition has been regularly passed, and there is nothing before the court but it and the statement of the debtor under the act, it will *prima facie* be held to be good, and unless there is some feature in it so gross as to excite the suspicion of fraud, it will be affirmed. — *In re Weber Furniture Co.*, 13 N. B. R. (E. D. Mich. C. Ct.) 559.

13. But if there manifestly appears some fraud, accident, or mistake, — such a contingency as would incline the court in any other case of ordinary practice, *ex mero motu*, to refuse to proceed, and upon notice to all parties concerned the court should require the exceptional and suspicious circumstances to be explained. — *Ibid.*

14. The District Court should not refuse to record a resolution for composition, although there is a wide discrepancy between the compromise offered and the apparent value of the property, with notice to the parties and hearing had of all facts which induced the creditors to accept the offer. — *Ibid.*

15. The majority of the creditors, acting fairly, may bind the minority as to the *quantum* of composition. — *Ibid.*

16. If the statement presented to the court shows that the requisite proportion of creditors have not voted to confirm the resolution, it cannot be recorded, though the statement is inaccurate. — *In re Asten*, 14 N. B. R. (E. D. N. Y.) 7.

17. Such statement can only be corrected at a meeting of the creditors. — *Ibid.*

18. In determining the reasonableness of a compromise under the act, it is a legitimate inquiry for the court, how many individual opinions were expressed in favor of it. — *Ibid.*

19. If a creditor is induced to vote or sign a composition by any unfair means, whether known to the debtor or not, his vote so influenced operates as a fraud on the other creditors and makes the composition voidable by any of them. — *In re Sawyer*, 14 N. B. R. (Mass. Dist.) 241.

20. If a vote is influenced by the expectation of advantage, though without any positive promise, it cannot be considered an unbiased vote. — *Ibid.*

21. Where the bankrupt made no promise to a creditor to sign his composition, nor was there any proof that he knew any thing about it, or that he knew that money was paid to another creditor not to oppose the composition, or that the

money came or was to come from him, yet as he had the benefit of it, he must be presumed to have had a part in obtaining it, until the contrary be shown. A composition obtained under such circumstances will be set aside. — *Ibid.*

22. A resolution of composition which provides that the payment shall be guaranteed, by a satisfactory bond to persons named as a committee of the creditors, will be recorded. — *In re Lewis*, 14 N. B. R. (S. D. N. Y.) 144.

23. A resolution for composition which does not provide for the payment of the costs of certain attachments, not dissolved because no assignment had been made, will be recorded, subject to be rescinded if necessary for the protection of the general creditors. — *In re Clapp*, 14 N. B. R. (Mass. Dist.) 191.

24. The recording of a composition does not dissolve attachments, nor is there any thing in the bankrupt law, excepting an assignment by the court or register. — *Ibid.*

25. Where the assets are sufficient to pay workmen their priority, they cannot be permitted to vote upon the matter of composition, except to the extent of their respective debts above fifty dollars. — *In re O'Neil*, 14 N. B. R. (Mass. Dist.) 210.

26. The mere fact that the debtor retains possession of the assets is no objection to the recording of a composition made before adjudication. — *In re Van Auker*, 14 N. B. R. (W. D. Mich.) 425.

27. The omission of the court to decree a debtor, in a voluntary petition, bankrupt, and issue a warrant, will not defeat a composition made before. — *Ibid.*

28. That a proposition for composition stipulates for the debtors retaining their assets is not fatal. It is purely surplusage, and any creditor on application may notwithstanding obtain a warrant of seizure. — *Ibid.*

29. Creditors fully secured need not be reckoned in computing the proportion who must join in a composition. — *Ibid.*

30. If a composition is duly recorded, it confines the secured creditor to his security, and discharges the debtor from personal liability for the secured debt. — *In re Lytle*, 14 N. B. R. (W. D. Pa.) 457.

31. Where a composition was entered into for cash payments, secured by mortgage upon real estate, the District Court has no jurisdiction to restrain by injunction creditors from suing and attaching the personal property of the debtor. — *Ibid.*

32. The court should provide for an unliquidated debt in composition cases as if the proceedings were in bankruptcy, by permitting a pending action to be prosecuted to judgment in the court where pending to ascertain the amount, or by ordering an inquiry at the bar of the Bankrupt Court. — *In re Trafton*, 14 N. B. R. (Mass. Dist.) 507.

33. A statement as to amount, made by the debtor by mistake, without fraud, will not vitiate the composition. — *Ibid.*

See ATTACHMENT, 3, 4; ATTORNEY, 1; CREDITORS, 1; PLEADING, 1.

#### CONSPIRACY.

1. Although § 5132 only mentions the bankrupt, yet all procurers and abettors of the person respecting whom proceedings in bankruptcy are commenced may, it seems, be indicted under the statute, though not expressly

referred to therein. — *United States v. Bayer*, 13 N. B. R. (U. S. C. Ct. Min.) 400.

2. Other persons than the bankrupt may combine and confederate with him to commit the acts made penal by the seventh and tenth subdivisions of § 5132 of the Rev. Stat. — *Ibid*.

#### CONSTITUTIONALITY.

A bankrupt law which adopts the State laws on the statute books of the State, at a particular date, in reference to exemptions, is constitutional. — *In re Smith*, 14 N. B. R. (N. D. Ga. C. Ct.) 295.

#### CONSTRUCTION.

1. When existing laws are amended by enactments that such a section shall read in an altered manner, and the altered section contains in part the old law and in part new provisions, the latter will be construed to relate to subsequent acts, and the former will be considered as having been the law from the time of its first enactment; and when there is no express repeal of the law, as it stood at the time of the amendment, that law will, in the absence of express provision to the contrary, be deemed to apply and to govern the validity and consequences of acts done before it was amended, and especially must this rule be adhered to when the amendatory law contains express provisions fixing the period of its retroaction in certain specified cases; for this specification almost necessarily leads to the conclusion that in all other and unspecified cases the amendment is not to have a retroactive effect. — *Oxford Iron Co. v. Slafter*, 14 N. B. R. (N. D. N. Y. C. Ct.) 380.

2. Courts will look carefully to see that the express idea of the legislative purpose is clear and distinct, that a new rule shall be applied to past acts. — *Ibid*.

3. It is not necessary to the invalidity of an act alleged to be preferential in its character, which took place in Dec., 1873, that it should come up to the test imposed by the Amendatory Act of 1874. Section 12 of the amendment of June 22, 1874, amended § 39, and limits the retroactive operation of the law to Dec. 1, 1873, and excludes any other period for retroaction. — *Ibid*.

#### CONTEMPT.

1. An injunction issued under § 5024 of the Revised Statutes, upon an involuntary petition, restraining a party "in the mean time, and until the hearing and decision upon said petition, and until the further order of the court," from making any transfer, &c., ceases to operate when the adjudication is made, and the party thereafter is not liable for contempt for doing any of the acts prohibited by said injunction. — *In re Irving*, 14 N. B. R. (S. D. N. Y.) 289.

2. In the absence of an injunction from this court, it is no contempt for a party to execute the decree of a State court, entered before adjudication in a foreclosure suit, by selling the property, giving a deed therefor, and in entering judgment for the deficiency against the mortgagor. — *Ibid*.

CONTRACTS. — See PROMISSORY NOTES, 1.

## CONVEYANCE.

1. The assignee cannot recover the value of security given by a debtor to a creditor, if the latter had no reasonable cause to believe that the debtor was at the time insolvent. — *Rankin v. Third National Bank*, 14 N. B. R. (E. D. Miss.) 4.

2. A deed of trust delivered as security for indorsements of notes, and not to be recorded till the grantee may deem best, is good against an assignee, if recorded before his rights attached, though after grantor's failure. — *National Bank of Fredericksburg v. Conway*, 14 N. B. R. (E. D. Vir. C. Ct.) 513.

3. Contra. — *Ibid.* 175.

## CORPORATION.

1. Only such portions of the Bankrupt Law as are expressly or impliedly adopted by § 37 are applicable to the corporations therein named. — *New Lamp Chimney Co. v. Ansonia Brass and Copper Co.*, 13 N. B. R. (U. S. S. Ct.) 385.

2. Corporations, since the amended act of June 22, 1874, cannot be adjudged bankrupts upon the petition of a single creditor. — *In re Detroit Car Works*, 14 N. B. R. (E. D. Mich.) 243.

3. Under the statute as amended June 22, 1874, to authorize an involuntary adjudication in bankruptcy against a corporation, the same proportion of creditors in number and amount must join as in case of a natural person. — *In re Oregon Bulletin Printing, &c. Co.*, 14 N. B. R. (C. Ct. Ore.) 405.

4. The provisions of the United States Bankrupt Act, which vest the property of a bankrupt in the assignee and require him at the request of the assignee to execute all necessary conveyances and transfers, do not take away the right of the bankrupt to vote on stock still standing in his name. — *State ex rel. v. Ferris*, 42 Conn. 560.

5. Where a bankrupt in whose name such stock was standing voted upon it, with the assent of the assignee, it was held that the other stockholders had no interest in the question whether the strict right to vote was in the bankrupt or in the assignee. — *Ibid.*

See ACTION, 4; COMPOSITION, 10; DECREE; PETITION, 9, 10; PROOF, 14.

## COSTS.

1. When the court, at the suggestion of the general creditors, authorizes the sale of property incumbered by liens, and the proceeds do not exceed the liens in amount, it has no control over the fund but to pay it to the lien creditors, chargeable only with the actual costs of sale. — *In re Blue Ridge R.R. Co.*, 13 N. B. R. (U. S. C. Ct. S. C.) 315.

2. Costs of an attachment will be allowed out of the estate, unless it can be affirmatively shown that the attachment did not and could not operate to preserve the property for the general creditors. — *Ex parte Holmes*, 14 N. B. R. (Mass. Dist.) 493.

## COUNSEL.

One who finds himself insolvent has a right in good faith to retain counsel to assist him in the proper discharge of his duty as a debtor in the Bankrupt Court, but he has no right to retain him with a view to prevent his property from being properly distributed, or to defeat or in any way hinder, delay, or

impede the operation of the act; and if the attorney receives the money for such purpose, knowing the debtor's insolvency, the payment is void and the assignee may recover the whole amount. — *Goodrich v. Wilson*, 14 N. B. R. (119 Mass. 429) 555.

COUNSEL FEES. — See EXEMPTION, 2.

#### COURT.

A State Court has jurisdiction to entertain a cause of foreclosure, if the assignee has taken no steps to redeem, and the mortgagee has filed no claim for the debt secured in the bankruptcy proceeding. — *McKay v. Funk*, 13 N. B. R. (Sup. Ct. Iowa) 334.

See CASE, 2; INJUNCTION, 1; JURISDICTION, 7; MORTGAGE, 8; RECEIVER, 4, 5; SEQUESTRATION; STAY OF PROCEEDINGS.

#### CREDITORS.

1. The word "creditors," as used in the bankrupt law relating to composition, means all who have debts provable in bankruptcy. — *Ex parte Trafton*, 14 N. B. R. (Mass. Dist.) 507.

2. A disputed claim is provable if there is any thing due on it. — *Ibid*.

#### DEBTS.

1. Voluntary contributions received by a person are not debts owing by him. — *In re Oregon Bulletin, &c. Co.*, 13 N. B. R. (Oregon Dist.) 503.

2. A voluntary agreement between certain persons to which the debtor is in no wise a party, to make a contribution to him, does not create an indebtedment to him. — *Ibid*.

#### DECREE.

A decree adjudging a corporation bankrupt is in the nature of a decree *in rem*, as respects the status of the corporation, and if the court rendering it has jurisdiction, it can only be assailed by a direct proceeding in a competent court, unless it appears that the decree is void in form, or that due notice of the petition was never given. — *New Lamp Chimney Co. v. Ansonia Brass and Copper Co.*, 13 N. B. R. (U. S. S. Ct.) 385.

#### DEED.

1. Where the deed of the register to the assignee was not duly acknowledged and recorded, a title from the assignee is good against one who takes a deed from the bankrupt after the commencement of proceedings in bankruptcy with full knowledge thereof. — *Brady v. Otis*, 14 N. B. R. (Sup. Ct. Iowa) 345.

2. Where parties to a deed of trust for security agreed that the same should not be recorded so that other creditors might not know it, intending it as a preference, the deed takes effect from the date of the recording and not of the delivery. — *Exchange National Bank of Columbus v. Harris*, 14 N. B. R. (W. D. Mo.) 510.

#### DEFENCE.

1. In a suit by the assignee of a bankrupt fire-insurance company upon

notes given for stock therein, the maker cannot set up in defence payment by surrender of certificates of indebtedness upon adjusted policies purchased by them with knowledge of the insolvency of the company and withdrawing the notes. — *Jenkins v. Armour*, 14 N. B. R. (N. D. Ill.) 276.

2. Such notes constitute a part of the capital stock, and were a trust fund for the benefit of the creditors, and the surrenders and transfers were a fraud which would be set aside independent of the bankrupt law. — *Ibid.*

DEPOSITION. — See INVOLUNTARY PETITION, 5; PROOF, 7.

#### DISCHARGE.

1. A mere omission to include all his property in his schedule is not, of itself, cause for refusing the bankrupt his discharge; it must be done for the purpose of concealment, or to defraud or to mislead. — *In re Smith*, 13 N. B. R. (S. D. Geo.) 256.

2. A fraud at common law, or under the statutes of the State, may be objected to a discharge, if it was made at a time so recent that it would affect any of the creditors who can come in under the bankrupt. — *In re Jones*, 13 N. B. R. (Mass. Dist.) 286.

3. A claim founded upon a breach of trust is not barred by a discharge even if it had been proved in bankruptcy proceedings. — *Johnson v. Worden*, 13 N. B. R. (Sup. Ct. Vt.) 335.

4. Notice of the intention of the creditor or the assignee to oppose the discharge must be made known to the register at the final meeting, a notice dated upon the day of the hearing, but not filed till a year after, and then with the clerk, and the specification filed with the register nine days after the day of the hearing, are insufficient. — *In re Buzbaum*, 13 N. B. R. (E. D. N. C.) 477.

5. The fact that a debtor was unable to procure the assent of a majority in number and value of his creditors to his discharge is no excuse for delay in filing his application therefor, when the time within which such application could be made had elapsed before the adoption of the amendment reducing the proportion required to assent. — *In re Lowenstein*, 13 N. B. R. (E. D. Mo.) 479.

6. Where a claim against a bankrupt was purchased by a friend with no conceivable motive but to benefit the bankrupt, and the assent of the creditor to the discharge was used to influence other creditors, the discharge will be refused. — *In re Whitney*, 14 N. B. R. (Mass. Dist.) 1.

7. The Supreme Court of South Carolina will stay a proceeding to revive a judgment, so that it may become a lien upon real estate, upon the application of a bankrupt, until the question of discharge is finally adjudicated in the Federal Courts. — *Bratton v. Anderson*, 14 N. B. R. (Sup. Ct. S. C.) 99.

8. Specifications of objections to a discharge must be as exact as the specifications in an indictment. — *In re Butterfield*, 14 N. B. R. (N. D. Ill.) 147.

9. Where debts are proved, and assets come to the hands of the assignee, the debtor need not apply for his discharge within one year from adjudication of bankruptcy. — *In re Holmes*, 14 N. B. R. (Dist. Ct. Vt.) 209.

10. Any proceeding to set aside a discharge in bankruptcy must be commenced within two years from the date of the same. — *Pickett v. McGavick*, 14 N. B. R. (W. D. Ark.) 236.

11. District Courts may in their discretion allow creditors to appear and file specifications of objections to a discharge, although the time therefor has expired. — *In re Levin*, 14 N. B. R. (N. D. Ill.) 385.

12. In an action upon a bond, conditioned that the party arrested should apply for the benefit of the insolvent laws of the State, a plea of a subsequent discharge in bankruptcy of the debtor is good, unless the debt is one not barred by the discharge. — *Hubert v. Horter*, 14 N. B. R. (Sup. Ct. Pa.) 430.

13. A bankrupt will be refused his discharge, if the consent of any creditor is procured by a pecuniary consideration, though the requisite number had already assented. — *In re Palmer*, 14 N. B. R. (E. D. Va.) 437.

14. The obligation incurred to the one creditor, as the price of his assent, is as much a fraud upon those who had before signed the certificate of assent as upon those who had not. — *Ibid.*

15. Where a creditor's proof of claim was expunged after filing objections to the debtor's discharge, other creditors will not be allowed to come in and prosecute them. — *In re McDonald*, 14 N. B. R. (W. D. Pa.) 477.

16. Satisfaction of judgment will not be entered of record in the State Court upon the production of a discharge in bankruptcy, unless the judgment is one which by the proceedings in bankruptcy is released and discharged. — *Robinson v. Wilson*, 14 N. B. R. (Sup. Ct. Kan.) 565.

See ASSENT; BOOKS OF ACCOUNT; COMPOSITION, 7; FIDUCIARY DEBT, 2; JUDGMENT, 2; PRACTICE, 17; PREFERENCE, 1; PROMISSORY NOTE, 3; RECORD.

DISCRETIONARY POWER. — See PROOF, 6.

#### DIVIDEND.

An assignee can withhold the payment of an unauthorized dividend. — *In re Herrick*, 13 N. B. R. (N. D. N. Y.) 312.

ERROR. — See JUDGMENT, 1.

#### ESTOPPEL.

1. Creditors whose claims are secured by a bill of sale from the debtor, or who are thereby preferred, are estopped to claim its execution as an act of bankruptcy. — *In re Williams*, 14 N. B. R. (E. D. Mich.) 132.

2. Where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. — *Willis v. Carpenter*, 14 N. B. R. (Mass. C. Ct.) 521.

3. In a suit to recover for the unlawful detention of goods, it appeared that the defendant had taken a bill of sale of the goods as security, but had afterwards deliberately proved a claim in bankruptcy, based upon the assumption that he was the owner absolutely of the goods, and attempted to support this claim by his oath. It was held that he was estopped from claiming them as security. — *Ibid.*

See BILL OF SALE, 3.

#### EVIDENCE.

1. Where it appears that each side stand upon their legal rights, endeavor-



oring to obtain all the advantages the law will afford them, there is no such collusion between the parties as should deprive them of any rights to which they would otherwise be entitled. — *Whited v. Pillsbury*, 13 N. B. R. (Me. D.) 241.

2. The declarations of partners who have retired from the firm, as to the time of the dissolution, are inadmissible, in a suit by the assignees to recover for a fraudulent preference made by the continuing partner. — *Nudd v. Burrows*, 13 N. B. R. (U. S. S. Ct.) 289.

3. When it is established that the bankrupt and a creditor have conspired to give the latter a fraudulent preference, the declarations of the bankrupt are competent evidence against the creditor, although not made in the presence of or brought to the knowledge of the creditor. — *Ibid.*

4. Where the declaration upon a promissory note in a suit against the assignor in the State of Illinois avers that a suit against the maker would have been unavailing, and the defendant takes issue thereon, the record of an adjudication of bankruptcy against the maker of the note before suit brought thereon is not only competent but conclusive evidence in support thereof. — *Wills v. Clafin*, 13 N. B. R. (U. S. S. Ct.) 437.

5. Where a party is charged with absconding, his declarations while on his journey as to his intentions in regard to returning, are admissible to disprove the charge. — *United States v. Penn*, 13 N. B. R. (S. D. Ohio) 464.

6. The examination before a commissioner was such a judicial proceeding as to come within the rule allowing the testimony of a witness then examined and since dead, to be admitted, the same issue pending in the indictment in this court. — *Ibid.*

7. Where a written answer is stricken out of the case, it is nevertheless an admission and may be used in evidence. — *In re Oregon, Bulletin, &c. Co.*, 13 N. B. R. (Oregon Dist.) 503.

8. And, though sworn to, it is not conclusive. — *Ibid.*

9. If the statement of the pleadings and record show that the cause of action set up was an alleged fraudulent breach of duty by the defendant as an attorney, they are conclusive evidence that the debt was created while he was acting in such capacity. — *Flanagan v. Pearson*, 14 N. B. R. (Sup. Ct. Tex.) 37.

10. The testimony of one present at an auction sale as to his understanding of the bid at which the property was knocked off is admissible. — *Ives v. Tregent*, 14 N. B. R. (Sup. Ct. Mich.) 60.

11. A defendant, in a suit by an assignee to recover money alleged to have been fraudulently paid him by the bankrupt, having admitted that a statement made by the bankrupt in his presence was true, the plaintiff might prove what that statement was by one who heard it. — *Goodrich v. Wilson*, 14 N. B. R. (119 Mass. 429) 555.

12. The fact that the statement was made in the course of the bankrupt's examination before the register did not render it incompetent. — *Ibid.*

13. What the bankrupt said to the defendant at the time of borrowing money from him could have no bearing upon the question whether the defendant knew, or had reasonable cause to believe, the bankrupt to be insolvent at the time of the repayment of the money some days afterwards, and is inadmissible. — *Ibid.*

14. When the bankruptcy of a party, and the sale and assignment by his assignee of a judgment in his favor, are to be proved, a certified transcript of the adjudication and the written assignment of the judgment, are the best evidence. — *Files v. Harbison*, 29 Ark. 307.

See INSOLVENCY, 1; PREFERENCE, 3; WITNESS, 1, 2.

#### EXAMINATION.

1. If a full examination of a bankrupt has already been had, either upon the application of the assignee, or of any other creditor, a subsequent application may be properly denied, unless it is made to appear that the first examination was either collusive or deficient in some material and specified particulars. — *In re Frisbie*, 13 N. B. R. (E. D. Mich.) 349.

2. It is the right of the creditor to have a full disclosure upon oath, by the bankrupt, of every thing relating to his estate, and with such detail as will furnish to the assignee all the information in his power to render, and which may be necessary or useful to the assignee for the discharge of his duties; and it is the duty of the bankrupt promptly, on all reasonable applications, to submit to such examination. — *Ibid.*

See ASSIGNEE, 4.

#### EXEMPTIONS.

1. Individual exemptions cannot be allowed out of the partnership estate at the expense of the joint creditors. — *In re Stewart*, 13 N. B. R. (Geo. Dist.) 295.

2. Where the bankrupt, two days before the filing of his petition, obtained money upon a mortgage, which he retained, it was held upon petition of the assignee for an order to compel him to pay it over, that the bankrupt might retain a portion to pay counsel for preparing his petition and schedules, and also such sum as the assignee might determine to be necessary for the temporary support of himself and family, not exceeding, with his furniture and other articles, five hundred dollars, but that he could not retain the probable expenses of procuring his discharge. — *In re Thompson*, 13 N. B. R. (E. D. Mich.) 300.

3. A bankrupt is entitled to the exemption of his household furniture and other necessities, and if they have been sold by an officer, he will be required to pay over the money derived from the sale of the same. — *In re Martin*, 13 N. B. R. (N. D. N. C.) 397.

4. If the State law in regard to exemptions was changed during the year 1871, the law in force at the close of the year is to govern in the assignment of exemptions. — *In re Baer*, 14 N. B. R. (N. D. Ohio) 97.

5. A partner will not be entitled to a homestead as exempt, purchased within three days of the filing of the petition for adjudication, with notes taken by him from the firm assets, he knowing the insolvent condition of the firm. — *In re Boothroyd*, 14 N. B. R. (E. D. Mich.) 223.

6. Partnership property cannot be set apart to the individual members as exempt. — *Ibid.*

7. A building erected for business purposes, and not intended for or having any of the conveniences or comforts of a dwelling-house, cannot be so made and claimed as exempt under Wisconsin laws by the bankrupt and his family

moving into and occupying it a few weeks before his bankruptcy. — *In re Lammer*, 14 N. B. R. (W. D. Wis.) 460.

See CONSTITUTIONALITY; MORTGAGE, 8.

#### EXPENSES.

Where there are assets of the firm and of the individual members of the firm, each estate must pay its proportion of the entire expenses of administering the estate. — *In re Smith*, 13 N. B. R. (N. D. N. Y.) 500.

FACT. — See FRAUD, 1.

FACTOR. — See PREFERENCE, 2.

#### FEEs.

1. Where it appeared that more than fifty per cent of the estate had been taken to pay the assignee and his attorneys, the whole estate being \$1,359.30, the petition of the attorneys for an additional allowance of \$250, was dismissed and the petitioners severely rebuked. — *In re Drake*, 14 N. B. R. (N. J. Dist.) 150.

2. The marshal is entitled to a fee of two dollars for serving a copy of the petition upon the debtor as well as the order to show cause, in an involuntary case. The charge for commissions for disbursing money cannot be limited to expenses of court. The marshal is not entitled to commission on the value of the property seized and held by him. — *In re Burnell*, 14 N. B. R. (E. D. Wis.) 498.

See MARSHAL, 4.

#### FIDUCIARY DEBT.

1. A debt growing out of the conversion by an attorney of his client's money, in his hands as such, is a debt created whilst acting in a fiduciary capacity. — *Flanagan v. Pearson*, 14 N. B. R. (Sup. Ct. Tex.) 37.

2. If a consignee of goods to be sold on commission sells, and fails to pay over the proceeds, he creates a debt while acting in a fiduciary character, from which he is not released by obtaining a discharge under the bankrupt act. — *Meador v. Sharpe*, 14 N. B. R. (54 Geo. 125) 492.

#### FRAUD.

1. When a vendor or mortgagor was permitted to retain the possession and control of his goods and act as apparent owner, with or without power to sell them, is a question of fact whether it is a fraud or not. — *Brett v. Carter*, 14 N. B. R. (Mass. Dist.) 301.

2. An act lawful and honest and not fraudulent as to debtor or as to other creditors, but for the inhibition of the Bankrupt Act, is not an actual fraud. — *In re Riorden*, 14 N. B. R. (S. D. N. Y.) 332.

See COMPOSITION, 19.

#### FRAUDULENT CONVEYANCE.

1. A creditor, before taking security for his debt, is bound to make inquiry as to the debtor's condition, and cannot rely upon the statement of the debtor alone in respect to it, that it will not operate as a fraud upon other creditors. — *Bucknan v. Goss*, 13 N. B. R. (Me. Dist.) 337.

2. Where the wife of a debtor received a transfer of real estate from her husband, through mesne conveyances and without consideration, and made a mortgage of the same to secure the husband's creditor, he knowing that the husband was insolvent at the time, the conveyances will be set aside as fraudulent. — *Gibson v. Dobie*, 14 N. B. R. (E. D. Wis.) 156.

See ACT OF BANKRUPTCY, 2; ASSIGNMENT, 5.

#### FRAUDULENT PREFERENCE.

1. An exchange of securities within the four months is not a fraudulent preference, within the meaning of the Bankrupt Act, even where the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it. — *Sawyer v. Turpin*, 13 N. B. R. (U. S. S. Ct.) 271.

2. A mortgage of personal property, given in exchange for a bill of sale of the same property within four months of the filing of the petition in bankruptcy, and recorded pursuant to the requisition of the State law, before any rights of the assignees in bankruptcy accrued, cannot be impeached by them, as a fraudulent preference. — *Ibid*.

3. If it appears that the bankrupt has facilitated the seizure of his property upon execution, by any affirmative action on his part, and the creditor was aware of it, a fraudulent preference has been made. — *In re Baker*, 14 N. B. R. (N. D. N. Y.) 433.

GARNISHEE. — See ATTACHMENT, 2.

#### GIFT.

The agreement by a husband that his wife may have whatever is realized out of a claim for destruction of a vessel by a rebel cruiser is promissory, and does not constitute an absolute and perfect gift. — *Williamson v. Colcord*, 13 N. B. R. (Dist. Me.) 319.

#### HOMESTEAD.

1. The purchase of a homestead by an insolvent trader, upon the eve of bankruptcy with knowledge of his insolvent condition, and for the purpose of placing the property beyond the reach of process, is a fraud, and void as to creditors. — *In re Boothroyd*, 14 N. B. R. (E. D. Mich.) 223.

2. A bankrupt is not entitled to a homestead exemption out of property, incumbered by judgment upon debts created antecedent to the adoption of the Constitution of North Carolina. — *In re Shipman*, 14 N. B. R. (W. D. N. C.) 570.

See MARSHALLING ASSETS, 2.

#### HUSBAND AND WIFE.

If a husband by his skill, sagacity, and energy, in dealing in real estate in his wife's name, upon money contributed by her, accumulates a large amount of property, it belongs to his assignee. — *Muirhead v. Aldridge*, 14 N. B. R. (N. J. C. Ct.) 249.

## INDICTMENT.

1. Under an indictment brought under § 5132, Revised Statutes, ninth clause, which charges the defendant, within three months before the commencement of proceedings in bankruptcy, under the false color and pretence of carrying on business and dealing in the ordinary course of trade, with obtaining goods on credit with intent to defraud, the government must show that the defendant pretended to the party of whom he purchased that he was carrying on business as a merchant at B., and dealing in the ordinary course of trade, and that the seller in consequence of this pretence was induced to part with his goods, and that this pretence was false; that is, that he was not in fact carrying on business as a merchant at B., and dealing in the ordinary course of trade. The pretence may not have been in words, but by conduct. — *United States v. Penn*, 13 N. B. R. (S. D. Ohio) 464.

2. Under an indictment under the tenth clause of § 5132, charging the sale of goods obtained on credit, within three months, with intent to defraud, the government must show that the intent existed in the mind of the defendant at the time the sale was made, and that the intent was to defraud his creditors in general, and not the one of whom he purchased the goods. — *Ibid*.

## INJUNCTION.

1. If, in a proceeding in a State court to foreclose a mortgage, the bankrupt moves for a stay of proceedings, that portion thereof looking to a personal judgment against him will be stayed. — *McKay v. Funk*, 13 N. B. R. (Sup. Ct. Iowa) 334.

2. State courts will be enjoined from further proceedings, under a creditor's bill for the appointment of a receiver, after the filing of a petition in bankruptcy. — *In re Whipple*, 13 N. B. R. (N. D. Ill.) 373.

See CONTEMPT, 1; JURISDICTION, 1; PLEADINGS, 1; SEQUESTRATION.

## INSANE PERSON.

A party under guardianship as a lunatic may be adjudged a bankrupt against the consent of his guardian, upon an involuntary petition. — *In re Weitzel*, 14 N. B. R. (W. D. Wis.) 466.

## INSOLVENCY.

1. An assignment to a trustee for the benefit of creditors of all a debtor's property, which necessarily puts an end to his business, and gives a preference to some, is made out of the usual course of business, and, if made in contemplation of insolvency, is not only *prima facie* but conclusive evidence of an intent on the part of the debtor to defeat the operation of the Bankrupt Act. — *Jackson v. McCulloch*, 13 N. B. R. (W. D. Tex.) 283.

2. A debtor is insolvent when his property put up upon reasonable notice for sale, where it exists, under the circumstances of the case will not bring enough to pay his debts. — *In re Oregon Bulletin Printing and Publishing Co.*, 13 N. B. R. (Oregon Dist.) 503.

## INSOLVENT.

A trader is insolvent when he cannot pay his debts in the ordinary course

of business, though he may not be compelled to stop, and though upon a settlement of his affairs he may have sufficient to pay in full. — *Jackson v. McCulloch*, 13 N. B. R. (W. D. Tex.) 283.

INSOLVENT LAW. — See ASSIGNMENT, 4.

#### INSTRUCTIONS TO THE JURY.

Instructions to the jury are entitled to a reasonable construction; and, if correct when applied to the facts submitted to the jury, they ought to be sustained in an Appellate Court, even though if standing alone, or without any explanation, they would be incomplete in respect of some matter sufficiently explained in the evidence. — *Willis v. Carpenter*, 14 N. B. R. (Mass. C. Ct.) 521.

#### INSURANCE.

Where the condition of a policy of insurance was that it became void, if the insured property should be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, such policy becomes void upon the adjudication of the insured and the assignment to his assignee. — *Perry v. Lorillard Fire Ins. Co.*, 14 N. B. R. (N. Y. Com. of Ap'ls.) 339.

INTENT. — See BURDEN OF PROOF, 4; PREFERENCE, 3.

INTERVENOR. — See PLEADINGS, 2.

#### INVOLUNTARY BANKRUPTCY.

It is not a compulsory or involuntary bankruptcy, where one partner files a petition in bankruptcy against his copartner. — *In re Wilson*, 13 N. B. R. (Mass. Dist.) 253.

See COMPOSITION, 3.

#### INVOLUNTARY PETITION.

1. In an involuntary petition, alleging a preference, it is immaterial what was the knowledge or motives of the parties who received the payments. — *In re Oregon Bulletin, &c. Co.* 13 N. B. R. (Oregon Dist.) 503.

2. Where the depositions in support of an involuntary petition are defective, the petition will not be dismissed, but the petitioning creditor upon motion will have leave to file further and supplementary depositions. — *Cunningham v. Cady*, 13 N. B. R. (W. D. Ohio) 525.

3. In such case the order to show cause will be set aside, with leave to file supplemental proofs in support of petitioner's claim as to the acts of bankruptcy, when an alias order to show cause will be entered. — *Ibid.*

4. A deposition in proof of the petitioner's claim against the debtor must show whether the same is secured or unsecured, or if secured to what extent. — *Ibid.*

5. Creditors who have secured a lien upon the debtor's property by attachment are included in reckoning the number and amount necessary to join in an involuntary petition. — *In re Scrafford*, 14 N. B. R. (Kan. Dist.) 184.

6. A petition in involuntary bankruptcy, which states upon belief, without alleging either knowledge or information, that the requisite proportion of

creditors have joined, is sufficient. — *In re Mann*, 14 N. B. R. (N. D. N. Y.) 572.

See ACT OF BANKRUPTCY, 4; BURDEN OF PROOF, 1; COMPOSITION, 2.

#### JOINT AND SEVERAL LIABILITY.

A judgment obtained against the bankrupts, partners, and four others, is not a debt which can be proved against the partnership estate, but against the separate estate. — *In re Herrick*, 13 N. B. R. (N. D. N. Y.) 312.

JUDGES. — See PRACTICE, 1.

#### JUDGMENT.

1. Though judgment be entered providing that no execution shall issue till the further order of court, yet it is erroneous after motion to stay proceedings. — *McKay v. Funk*, 13 N. B. R. (Sup. Ct. Iowa) 334.

2. No special judgment will be entered to be enforced by action upon a bond given to dissolve an attachment made more than four months before the filing of the petition, and after the defendant had commenced proceedings in bankruptcy. — *Hamilton v. Bryant*, 14 N. B. R. (Sup. Ct. Mass.) 479.

3. When there is a judgment of the court that the requisite proportion of creditors in number and amount have joined in the petition for adjudication, such judgment is final, not only as respects the debtor, but all the creditors, and cannot be re-examined, unless fraud be alleged and proved. — *In re Duncan*, 14 N. B. R. (S. D. N. Y.) 18.

4. The affirmance of judgment upon appeal, pending proceedings in bankruptcy, begun after appeal was taken, and in the absence of any suggestion by the defendant of his bankruptcy, is not a nullity. — *Flanagan v. Pearson*, 14 N. B. R. (Sup. Ct. Tex.) 37.

5. The question whether a judgment was obtained for fraud is to be determined from an inspection of the record in the case, including the pleadings, and is not for the jury. — *Ibid.*

6. A judgment may be enforced against property on which it is a lien, and which was sold by the defendant before the filing of his petition in bankruptcy. — *Phillips v. Bowdoin*, 14 N. B. R. (Sup. Ct. Geo.) 43.

7. And even after the claim is proved in bankruptcy, if the proof has been withdrawn upon special order of the bankrupt court. — *Ibid.*

8. And although his attorney was allowed compensation for bringing assets into the court of bankruptcy. — *Ibid.*

9. Although an attachment has been made more than four months before proceedings in bankruptcy are instituted, special judgment will not be entered against the property till the bankrupts have obtained their discharge, or no unreasonable delay on their part in endeavoring to obtain it is shown. — *Ray v. Wight*, 14 N. B. R. (119 Mass. 426) 563.

10. A judgment entered upon an attachment dissolved by the defendant's bankruptcy is void. — *King v. Loudon*, 14 N. B. R. (Sup. Ct. Geo.) 383.

See DISCHARGE, 5, 8, 15; INJUNCTION, 1; JOINT AND SEVERAL LIABILITY; LIEN, 6.

## JUDGMENT CREDITOR.

The bankruptcy of the debtor does not extinguish or affect the right of the judgment creditor to redeem property sold under execution, where the statutes create a distinction between their rights. — *Trimble v. Williamson*, 14 N. B. R. (Sup. Ct. Ala.) 53.

See LIEN, 5.

## JURISDICTION.

1. Except where otherwise provided by the bankrupt law, the Federal Courts are expressly prohibited by § 720 of the Revised Statutes from enjoining the State Courts from the prosecution of suits. — *Haines v. Carpenter*, 1 Otto, 254.

2. Jurisdiction of mortgaged property is acquired by the bankrupt court by the redemption by the assignee or the assent of the creditor, otherwise decree of the State Court upon application of the mortgagee is not void. — *Brown v. Gibbons*, 13 N. B. R. (Sup. Ct. Iowa) 407.

3. The Circuit Court has no jurisdiction to entertain a bill in equity, filed by creditors, trustees of the bankrupt, before the appointment of an assignee to restrain a mortgagee in possession of the chattels from disposing of the goods. — *Johnson v. Price*, 13 N. B. R. (E. D. Mich.) 523.

4. But it would seem that the District Court had. — *Ibid*.

5. One court cannot take judicial notice of the proceedings in bankruptcy in another court, and it is the duty of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it is informed of the changed relations of any of those parties to the subject-matter of the suit. — *Eyster v. Gaff*, 13 N. B. R. (U. S. S. Ct.) 546.

6. The mere filing of a petition in involuntary bankruptcy against a mortgagor does not divest a State Court of jurisdiction over a pending suit for foreclosure. — *In re Irving*, 14 N. B. R. (S. D. N. Y.) 289.

7. The Revised Statutes of the United States take away the jurisdiction of the State Courts over a suit by an assignee to recover property alleged to have been fraudulently conveyed by the bankrupt, even though the statutes were passed after the action was commenced. — *Frost v. Hotchkiss*, 14 N. B. R. (Sup. Ct. N. Y.) 443.

8. The right of a bankrupt to his discharge depends entirely upon the statute. He can only demand it, when he has complied with all the conditions prescribed. — *Ibid*.

9. The court is as much bound by the provisions of the act as the bankrupt, and must refuse the discharge if the bankrupt has in any particular failed, and the court is not to inquire whether the act complained of has been productive of harm, but whether it has been done. — *Ibid*.

10. On the recording of a resolution for composition, the debtor and his creditors having taken from the court the distribution of the assets of the debtor, all control and jurisdiction of the District Court over the debtor's property went with it. — *In re Lytle*, 14 N. B. R. (W. D. Pa.) 457.

11. Under § 2, cl. 2, of the act of March 2, 1867, now § 4979 of the Revised Statutes, the Circuit Court of the United States has, without reference to the citizenship of the parties, jurisdiction of a suit against an



assignee in bankruptcy, brought by any person claiming an adverse interest, touching any property, or rights of property, transferable to, or vested in, such assignee. — *Burbank v. Bigelow*, 14 N. B. R. (U. S. C. Ct.) 445.

12. The jurisdiction of a State Court over an action by an assignee in bankruptcy against a person to whom the bankrupt has made a fraudulent preference, is not excluded by the Bankrupt Act, or the amendment thereto of 1874. — *Goodrich v. Wilson*, 14 N. B. R. (119 Mass. 429) 555.

See ACTION, 5; ATTACHING CREDITOR, 1; COMPOSITION, 81; LIEN, 3, 7; PRESUMPTION, 1, 2.

#### JURY.

It is the right and duty of the court to aid the jury in commenting upon the evidence, but they must distinctly understand that what is said as to the facts is only advisory, and in no wise intended to fetter the exercise finally of their own independent judgment. — *Nudd v. Burrows*, 13 N. B. R. (U. S. S. Ct.) 289.

See JUDGMENT, 5.

#### JURY TRIAL.

A petition for payment of rent which accrued after the proceedings in bankruptcy were begun, and while the assignee was in the occupancy of the same, may be tried by a jury. — *Buckner v. Jewell*, 14 N. B. R. (U. S. Sup. Ct.) 286.

#### LANDLORD AND TENANT.

The expenses of the estate cannot be deducted from the rent accruing after bankruptcy proceedings, and while the premises were occupied by the assignee. — *Buckner v. Jewell*, 14 N. B. R. (U. S. C. Ct. La.) 286.

See LEASE.

#### LEASE.

If assignees continue to occupy the premises leased by the bankrupt, they are liable personally for the rent, and the landlord has his lien upon their goods in the premises, the same as against other tenants. — *Buckner v. Jewell*, 14 N. B. R. (U. S. C. Ct. Iowa) 286.

#### LIEN.

1. Notes given to a bank to raise money upon are not held by it as a pledge or lien. — *In re Weeks*, 13 N. B. R. (S. D. N. Y.) 263.

2. If an assignee suspects any incumbrance, he may sell under order of court free from incumbrance, and thereby compel the holder of the lien to make good his claim by proof before distribution of assets. — *Assignee of Weeks v. Perkins*, 13 N. B. R. (E. D. Tex.) 280.

3. The Bankrupt Act does not divest a lien, but as all the property of a bankrupt, as well that subject to mortgages and liens, as that which is unincumbered, passes to the assignee, and is *in custodia legis*, subject to priorities and liens, it follows that the bankrupt court is the proper tribunal in which to administer the remedies for the enforcement of liens. — *Blum v. Ellis*, 13 N. B. R. (Sup. Ct. N. C.) 345.

4. Preferences and liens are as much entitled to protection from the Bankrupt Court as any other legal rights. — *Barron v. Morris*, 14 N. B. R. (W. D. Tex. C. Ct.) 371.

5. A judgment creditor, who levied upon personal property, and subsequently dismissed his levy and suffered the property to go back to the defendant, is not compelled to follow it into the Bankruptcy Court, but may enforce his lien upon land sold by the bankrupt before commencement of bankruptcy proceedings. — *Winship v. Phillips*, 14 N. B. R. (Sup. Ct. Geo.) 50.

6. A lien obtained by judgment, and levy will not be displaced by subsequent proceedings in bankruptcy, though commenced within four months after the levy of the execution or rendition of the judgment. — *Mason v. Warthen*, 14 N. B. R. (W. Va. Sup. Ct.) 346.

7. Where a party voluntarily appears and moves the court to enforce a pretended lien, the court thereby acquires jurisdiction to proceed and dispose of the whole matter in a summary way. — *In re Worthington*, 14 N. B. R. (W. D. Wis.) 388.

8. Lien claimants can, as an equivalent for commencing suits in the State Courts, assert or prove their liens in the bankruptcy proceedings within the time limited by the statute creating the lien. — *In re Brunquest*, 14 N. B. R. (W. D. Wis.) 529.

9. Such liens will not be kept alive by virtue of bankruptcy proceedings alone, the statute creating them requiring some act to be done to preserve them. — *Ibid*.

10. Liens which derive their existence wholly from State statute, and the continuance of which are, by such statute, made dependent upon the commencement of a suit within a prescribed period, are not preserved as a valid incumbrance upon the bankrupt's property, when no suit has been commenced in the State Court, and no step taken in the Bankrupt Court equivalent to such suit within the time limited by the statute for the preservation and enforcement of the lien. — *Ibid*.

11. To preserve a statutory lien, dependent for its continued existence upon observance of terms of the statute, those terms must be complied with, by performance of the required act or its equivalent. — *Ibid*.

See ASSIGNMENT, 6; ATTACHMENT, 2, 5; COSTS, 1; LEASE; MORTGAGE, 3, 4, 14; PREFERENCE, 2; RENTS.

LIQUIDATED DEBTS. — See COMPOSITION, 32.

#### MARSHAL.

1. When the taxation of the marshal's bill by the clerk is made, it is conclusive upon the marshal and the assignee; and the marshal is entitled to receive the amount at once, unless it be shown to the court that there is some fraud or bad faith on the part of the marshal or assignee. — *In re Rein*, 13 N. B. R. (S. D. N. Y.) 551.

2. When so taxed, the marshal is entitled to have a check therefor countersigned by the register. — *Ibid*.

3. An assignee may consent to the taxation of the marshal's bill at a certain amount after examination, and such consent is a sufficient warrant for the taxing of the bill by the clerk. — *Ibid*.

4. When the marshal has rendered his services, he may have his bill taxed, if there be an assignee, without awaiting the presentation of the assignee's

final account. In such case, notice of taxation is given to the assignee, and need not be given to creditors. — *Ibid.*

#### MARSHALLING ASSETS.

1. Where there are assets of the firm and of the individual members thereof, the firm creditors cannot share in the individual estate, until the individual creditors are paid in full. — *In re Smith*, 13 N. B. R. (N. D. N. Y.) 500.

2. A debtor has no right to have first exhausted the property not included in the homestead, in order to preserve to him his homestead. — *In re Sawthoff*, 14 N. B. R. (W. D. Wis.) 364.

See TRUST FUNDS.

#### MORTGAGE.

1. An indorsement upon the back of a mortgage for the purpose of covering property acquired since its execution, if made to defraud creditors, is void, but it does not affect the validity of the original mortgage. — *Whited v. Pillsbury*, 13 N. B. R. (Dist. Me.) 241.

2. If an attaching creditor pay off a mortgage, he becomes entitled to be paid from the proceeds of the property after it has been sold by the assignee in bankruptcy. — *Ibid.*

3. A proceeding to enforce a mortgage or other specific lien involves the right of property; and possession in pursuance thereof, legally or judicially, taken before proceedings in bankruptcy, cannot be interrupted by those proceedings. — *Davis v. R. R. Co.*, 13 N. B. R. (N. D. Fla.) 258.

4. The lien of a mortgagee is not lost by not proving his claim, he may enforce it at any time before or after the end of bankruptcy proceedings. — *Assignee of Wicks v. Perkins*, 13 N. B. R. (E. D. Tex.) 280.

5. Where property subject to a mortgage is sold under order of court, it has no authority to adjust the claims of the trustees under the mortgage against their *cestuis que trust*, nor to ascertain what was due by trustees to counsel. — *In re Blue Ridge R.R. Co.*, 13 N. B. R. (U. S. C. Ct. S. C.) 315.

6. A mortgage given to secure a pre-existing debt and a present loan, will be held invalid in whole, if the mortgagee knows that the money loaned is to be used to prefer other creditors. — *Bucknam v. Goss*, 13 N. B. R. (Me. Dist.) 337.

7. A decree of foreclosure, in proceedings begun in a State Court, after proceedings in bankruptcy in respect to the mortgagor were instituted, is not void as to the parties made defendants in the suit. — *Brown v. Gibbons*, 13 N. B. R. (Sup. Ct. Iowa) 407.

8. A mortgagee who has not proved his debt in the Bankrupt Court may enforce his mortgage in the State Court, notwithstanding the property has been set off as exempt. — *Ibid.*

9. A mortgage of personal property, given for a loan of money made when executed and then valid, is not rendered invalid, because not recorded nor possession taken till within a month of the failure of the mortgagor. Even though the mortgagee knew of the insolvency of the mortgagor, and that the taking possession would be a preference. — *In re Barman*, 14 N. B. R. (E. D. Mich.) 125.

10. A mortgage of chattels which permits the mortgagor to continue in possession, and to sell the goods in the ordinary course of business, is not void upon its face, but is valid. — *Brett v. Carter*, 14 N. B. R. (Mass. Dist.) 301.

11. It is likewise valid by the law of Massachusetts if it covers after-acquired property. — *Ibid*.

12. The provision of a trust deed of personal property giving the grantor power to dispose of the goods as his own does not vitiate it as to other creditors. — *Barron v. Morris*, 14 N. B. R. (W. D. Tex. C. Ct.) 371.

13. The execution of a new deed and new notes is not a satisfaction of the first but merely a renewal, and does not affect the lien upon the goods named in the first deed. — *Ibid*.

14. But it may be void as to goods covered by the second and not in the first. — *Ibid*.

15. If a mortgagee does not prove his debt, he may proceed to enforce his mortgage without reference to bankruptcy proceedings, and notwithstanding the property has been set apart to the mortgagor as exempt. — *Hatcher v. Jones*, 14 N. B. R. (Sup. Ct. Geo.) 387.

16. Where a mortgage was made by a railroad corporation covering property of any kind "which may hereafter be acquired," it would include the lease of another road made after the execution of the mortgage. — *Barnard v. Norwich & Worcester R.R. Co.*, 14 N. B. R. (Mass. C. Ct.) 469.

See CONVEYANCE, 2; COURT, DEED, 2; JURISDICTION, 2; PREFERENCE, 10.

#### NOTARY PUBLIC.

1. The power given to notaries public to take proofs of debts carries with it as an incident the power to authenticate letters of attorney. — *In re Butterfield*, 14 N. B. R. (E. D. Mich.) 195.

2. General order 34 of 1871 was not intended to be exclusive of other methods of acknowledgment. — *Ibid*.

3. A notary public may receive and certify the acknowledgment of a trust deed, although he was interested as a beneficiary under the trust. — *National Bank of Fredericksburg v. Conway*, 14 N. B. R. (E. D. Va. C. Ct.) 513; *Ibid*. 175.

4. A notary public has authority to take acknowledgments of letters of attorney. — *In re McDuffee*, 14 N. B. R. (Me. Dist.) 336.

See OFFICIAL SEAL, 1.

NOTICE. — See ASSIGNMENT, 1; DEED, 1; MARSHAL, 4.

#### NOVATION.

Depositors of a banker cannot, by an assignment of their debts, change the existing relation and substitute other persons as his creditors, without the express sanction of the banker. — *Rollins v. Twitchell*, 14 N. B. R. (Me. Dist.) 201.

NUNC PRO TUNC. — See RECORD.

#### OFFICIAL SEAL.

1. The character of a notary's seal is determined by the law of the locality

from which the official derives his authority. — *In re Phillips*, 14 N. B. R. (W. D. Mich.) 219.

2. In the absence of express legislation the seal need not contain the official's name. — *Ibid*.

3. An official seal is the impression on the paper directly, or on wax or wafer attached thereto, made by the official as and for his seal. — *Ibid*.

4. It is the seal, and not its composition or character of words and devices, which raises the presumption of official character of which courts take judicial notice. — *Ibid*.

5. The presumption is that a seal is the official seal of the person it purports to be and who subscribes the *jurat*. — *Ibid*.

6. Any impression made upon sealing-wax or wafer adhering to paper, without any device or words indicative of the particular official, would be entitled to judicial sanction as evidence of the notarial or official character of the person subscribing the *jurat*. — *Ibid*.

OPPOSING INTEREST. — See REGISTER, 3, 4.

PARTIAL PAYMENT. — See PROOF, 1.

#### PARTNERSHIP.

Filing a petition by one partner to declare himself and his partners bankrupts, not prosecuted to a decree in bankruptcy, will not prevent other partners from bringing suit on their individual claim and prosecuting it to final judgment. — *Booth v. Meyer*, 14 N. B. R. (Sup. Ct. Pa.) 575.

See ACTION, 3; ASSETS, 2; EXEMPTION, 6; EVIDENCE, 2; INVOLUNTARY BANKRUPTCY; PETITION, 8.

PARTNERSHIP ASSETS. — See EXEMPTION, 1.

PARTNERSHIP AND INDIVIDUAL ESTATES. — See EXPENSES.

#### PETITION.

1. An assignment for the benefit of creditors, giving some preferences, necessarily is intended to defeat the law, and will be set aside upon petition of the assignee. — *Jackson v. McCulloch*, 13 N. B. R. (W. D. Tex.) 283.

2. Whether the president of a corporation was duly authorized to file a petition in bankruptcy in its behalf, is a question of fact to be determined by the court to which the petition was presented. — *New Lamp Chimney Co. v. Ansonia Brass and Copper Co.*, 13 N. B. R. (U. S. S. Ct.) 385.

3. In computing the number of creditors necessary to join in an involuntary petition, those under two hundred and fifty dollars are not to be counted if one-fourth of the creditors above that sum join. — *In re Woodford*, 13 N. B. R. (N. D. Ohio) 575.

4. In computing the amount, the aggregate of the petitioning creditors' debts must be equal to one-third of all the debts provable, irrespective of amounts. — *Ibid*.

5. A party may purchase claims to enable him to join in a petition for adjudication and to make up the necessary number. — *Ibid*.

6. But if such sale is void from fraud or want of consideration, and is set

aside for such reason, the claim reverts to the assignor, and in the court is reckoned as belonging to him, if a party to the petition, the assignee dropping out of the proceedings as a creditor. — *Ibid.*

7. An involuntary petition cannot be amended by adding a new party after all the testimony has been taken and the cause before the court for hearing. — *In re Pitt*, 14 N. B. R. (E. D. N. Y.) 59.

8. A firm cannot be adjudicated bankrupt upon an involuntary petition, when all the persons composing the firm are not before the court. — *Ibid.*

9. The same proportion of creditors must join in a petition to force a corporation into bankruptcy, as is required in the case of natural persons. — *In re Leavenworth Savings-Bank*, 14 N. B. R. (Dist. Ct. Kan. and C. Ct. S. D. Kan.) 82, 92.

10. A petition seeking to adjudicate a corporation as bankrupt must allege that the corporation is a moneyed business or commercial corporation. — *In re Oregon Bulletin Printing, &c. Co.* 14 N. B. R. (C. Ct. Ore.) 405.

11. A voluntary bankrupt who has contracted new debts, since the filing of his prior petition, may file a new petition in bankruptcy. *In re Drisko*, 14 N. B. R. (Mass. Dist. C. Ct.) 551.

See ADJUDICATION, 1, 2; AFFIDAVIT; INSANE PERSON; JUDGMENT 3; JURISDICTION, 6.

#### PLEADINGS.

1. If a bankrupt desires the benefit of his composition proceedings in an action brought against him, he must set them up in answer, the District Court will not interfere by injunction to restrain the debtor. — *In re Tooker*, 14 N. B. R. (E. D. N. Y.) 35.

2. An attaching creditor, intervening to contest an adjudication, stands in the relation of a privy, and may take advantage of any defence available to the debtor. — *In re Williams*, 14 N. B. R. (E. D. Mich.) 182.

See ESTOPPEL, 2.

#### PLEDGE.

Where one member of a firm pledges his own stock for the debt of the firm, overdue at the time of bankruptcy proceedings, he may, if he has the power, sell the stock and apply the surplus funds to another debt of the same person. — *In re Whiting*, 14 N. B. R. (Mass. Dist.) 307.

See LIEN, 1.

#### PRACTICE.

1. The personal conduct and administration of the federal judges in the discharge of their separate functions, is neither *practice*, *pleading* nor a *form*, nor *mode of proceeding*, requiring conformity to the practice of the State Courts. — *Nudd v. Burrows*, 13 N. B. R. (U. S. S. Ct.) 289.

2. Attaching creditors may intervene and object to an adjudication of bankruptcy. — *In re Jack*, 13 N. B. R. (N. D. Ga.) 296.

3. Proof of a debt in bankruptcy, after suit brought upon it, is not a sufficient plea in bar thereto. — *Brandon Manuf. Co. v. Frazar*, 13 N. B. R. (S. C. Vt.) 362.

4. Generally a defendant has a right to set up, by supplemental answer, matter of defence which has occurred or come to his knowledge subsequently to the putting in of his first answer, but he must apply to the court by motion for leave so to do, so that the opposite party may be heard, and the court may determine whether there has been inexcusable laches, or whether any of the reasons appear which are recognized as giving authority for denying the motion; and the court must grant leave, unless the motion papers show a case in which the court may exercise a discretion in granting or withholding leave. — *Holyoke v. Adams*, 13 N. B. R. (Ch. Ap. N. Y.) 413.

5. Where an attachment made more than four months before proceedings in bankruptcy were commenced, was dissolved by giving a bond, the court will not permit the bankrupt to set up his discharge subsequently obtained in a supplemental answer as a bar to the action. — *Ibid*.

6. An action begun in a State Court by attachment of property of a corporation, against which, pending the action, but not within four months after the attachment was made, proceedings in bankruptcy have been instituted, will not be dismissed on motion of the assignees in bankruptcy of the corporation for want of jurisdiction. — *Munson v. Boston, Hartford & Erie R. R.* (120 Mass. 81) 14 N. B. R. 173.

7. Where proceedings to foreclose a mortgage, were commenced in a State Court, and a decree for sale and judgment for the deficiency entered, before the adjudication in bankruptcy, such decree is a bar to any right of the assignee to raise the question of usury in regard to the mortgage. — *Cutter v. Dingee*, 14 N. B. R. (S. D. N. Y.) 294.

8. A plea of discharge should set forth the same in *haec verba*; it should also aver what court adjudged the defendant bankrupt, or granted him a discharge as such, and set out the facts upon which any court would acquire jurisdiction so to do. It should conclude with a verification and may be amended. — *Stoll v. Wilson*, 14 N. B. R. (Sup. Ct. N. J.) 571.

9. Where a person holding a policy of insurance assigns the same to an attorney to secure his fees in collecting the same, and becomes bankrupt, and, between the time of adjudication and the election of an assignee, the attorney, with the knowledge of all parties, compromises and dismisses the suit, the assignee upon motion may come in and have the dismissal stricken out, and become a party, although one term of the court has intervened. — *Home Ins. Co. of New York v. Hollis*, 14 N. B. R. (Sup. Ct. Ga.) 337.

10. Where a creditor has various funds out of which he may satisfy his claim, the court of equity will direct him which he will first appropriate to his claim, but the court will not exercise the power to the material injury or prejudice of the creditors holding the various funds. — *In re Sauthoff*, 14 N. B. R. (W. D. Wis.) 364.

11. Mere delay or postponing of payment is not regarded in such cases as a material injury, for the interest on the claim is deemed an adequate compensation to the party for such delay. — *Ibid*.

12. An action to foreclose a mortgage is not a difficult or doubtful remedy, or which would cause unreasonable delay, or materially injure or prejudice one's rights. — *Ibid*.

13. The assignee is the proper party to bring the fact of bankruptcy be-

fore the court, and to move the court for the dissolution of an attachment, and he should not be put upon terms. — *King v. Loudon*, 14 N. B. R. (Sup. Ct. Geo.) 383.

14. Where creditors object to the postponement of the proof of claims, the better practice is to have the objections entered at once, obtain a stay of proceedings, and have the case certified before any further action before the register transpires. — *In re Jackson*, 14 N. B. R. (E. D. Wis.) 449.

15. Upon the filing by the defendant in an action of contract, after his default and before judgment, of the copy of the adjudication of his bankruptcy in the United States District Court, he is entitled to have the case continued to await the determination of that court upon the question of his discharge, and, upon filing his certificate of discharge, to have judgment rendered in his favor. — *National Bank of Clinton v. Taylor*, 120 Mass. 124.

16. A judgment creditor, who, in Georgia, has a lien by statute on all the property of his debtor, whether it be in possession or has been sold in fraud of creditors, and who does not prove his debt in bankruptcy, may proceed by levy on property that had been fraudulently conveyed by the debtor before the passage of the Bankrupt Act, and may prosecute the same against the claimant, although the defendant in execution obtained a discharge in bankruptcy before a final trial of the claim case. — *Barber v. Terrell*, 54 Geo. 146.

17. Where money was obtained by sheriff by a sale of goods upon final process, and before the commencement of proceedings in bankruptcy, it is in the hands of the court for distribution, and will not be paid to the assignee in bankruptcy. — *Dyson v. Harper*, 54 Geo. 282.

See ASSENT; ASSIGNMENT, 6; DISCHARGE, 16; EVIDENCE, 7; PROOF, 17.

#### PREFERENCES.

1. Mere preferences, which are given without contemplation of bankruptcy, and more than six months before the petition cannot be set up against a discharge. — *In re Jones*, 13 N. B. R. (Mass. Dist.) 286.

2. The transfer of property to a factor to enable him to obtain a lien upon it, and with the intent to prefer him, is void, and may be set aside. — *Nudd v. Burrows*, 13 N. B. R. (U. S. S. Ct.) 289.

3. No specific or particular evidence is necessary to prove the intention to prefer. The act itself is sufficient evidence, when the payment is made by an insolvent debtor. — *In re Oregon Bulletin, &c. Co.*, 13 N. B. R. (Oregon Dist.) 503.

4. But the law will not presume an intended preference, if the debtor made the payment believing himself solvent. It is, however, incumbent upon him to show that he did not know his insolvency. — *Ibid.*

5. Where an attachment was made upon personal property, a receiptor taken, and a bill of sale of the property given to him afterward to secure him, and he applied the proceeds to the satisfaction of the executions taken out in the suits of the attaching creditors, it was held that if the proceeds were thus applied without regard to attachments, and without a demand perfected in execution, it would be a preference, but if applied upon the executions upon demand duly made, and the sales were in good faith, it would not be, unless it appeared that the parties intended a preference or fraud, to prevent



the property from distribution under the Bankrupt Act. — *Parsons v. Topliff*, 13 N. B. R. (119 Mass. 245) 547.

6. Prior to the amendment of 1874, the creditor who did not surrender a preference until he was compelled to do so, after contest, by the judgment of the court, was precluded from proving his debt. — *In re Lee*, 14 N. B. R. (N. D. N. Y.) 89.

7. The mere agreement by a debtor, that in a certain event he would deliver to a bank such securities as he might purchase with overdrawn funds, would not vest the title to such securities in the bank, or authorize it to take them as its property; and their transfer after his insolvency would be a preference. — *Payne v. Solomon*, 14 N. B. R. (N. Y. S. Dist.) 162.

8. An agreement that the securities shall, all the time they are in the debtor's hands, be in fact the property of the bank, is different from the promise of the debtor that he will, as a future act, turn over to them the title. — *Ibid*.

9. But if the bank merely certifies his checks in advance, relying upon his promise to make good his account during the day, such an overdraft simply creates the relation of debtor and creditor, and the transfer of the certificates after insolvency would be an act of bankruptcy. — *Ibid*.

10. Where a mortgage of chattels was made, covering enumerated goods and after-acquired goods, a second mortgage covering the same goods, made upon the eve of bankruptcy, does not constitute a preference. — *Brett v. Carter*, 14 N. B. R. (Mass. Dist.) 301.

11. But otherwise as to all goods not included in the first. — *Ibid*.

12. When a trustee deposits trust funds with his own in his individual name, and, within two months before his bankruptcy, transfers the funds to the trust account, such transfer is a preference; and the rule of ascertaining what belongs to each is by taking the deposits and withdrawals in the order of their dates, find out how much of the balance remaining at the time of the transfer belonged to the trust, and how much to the general fund, and divide accordingly. — *Ex parte Hobbs*; *In re Hapgood*, 14 N. B. R. (Mass. Dist.) 495.

13. On Dec. 11, 1874, property was conveyed to a creditor by a debtor, in consideration of his forbearance to sue, he agreeing to hold and convey the same to such use as shall be designated, on or before Feb. 1, 1875, in any composition between the debtor and the other creditors; but, if no composition was made, the creditor to hold absolutely, and his debt be discharged. On Feb. 8 the creditor took possession, and on March 27 the debtor was adjudged bankrupt. *Held*, that the creditor did not become absolute owner till Feb. 1, that the assignment did not constitute a payment till that time, that the preference did not begin till that time, and that the two months did not begin to run until the assignment constituted a payment. — *Haskell v. Frye*, 14 N. B. R. (C. Ct. Mass.) 525.

14. A bankrupt cannot prefer an alien creditor, in violation of the provision of the Bankrupt Act. — *Olcott v. MacLean*, 14 N. B. R. (Sup. Ct. N. Y.) 379.

See AGENT; AMENDMENT; COUNSEL; DISCHARGE, 2; EVIDENCE, 2, 3; MORTGAGE, 9; PETITION, 1; PROOF, 12.

## PRESUMPTION.

1. Where a bankrupt appears upon notice, and makes no objection to the jurisdiction of the court, every presumption is in favor of the validity of the adjudication in any collateral suit. — *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 13 N. B. R. (U. S. S. Ct.) 385.

2. Where the jurisdiction of the court is shown to have attached, the subsequent proceedings of a court of limited jurisdiction are presumed as regular as those of a court of general jurisdiction; and its decision, whether correct or otherwise, upon every question properly arising in the case, is binding and conclusive until reversed on appeal. — *Smith v. Engle*, 14 N. B. R. (Sup. Ct. Iowa) 481.

3. When rights involving substantial property values are vested, the presumption is that the legislature does not intend to destroy them, unless it so expressly declares. — *Tinker v. Van Dyke*, 14 N. B. R. (E. D. Mich. C. Ct.) 112.

See COMPOSITION, 21.

## PRIORITY,

1. A debt due the United States by a firm may be satisfied out of the individual estates of the partners, without resorting to the partnership assets. — *Lewis v. United States*, 14 N. B. R. (U. S. Sup. Ct.) 64.

2. And if some of the partners are out of the country, they may claim priority of payment out of the separate estate of the resident partners, before resorting to the firm assets. — *Ibid.*

3. Where there is a trust fund in the hands of a trustee appointed by the Bankruptcy Court, the United States may pursue both in the Circuit Court, to obtain the payment of its claim by priority. — *Ibid.*

4. The United States are entitled to priority of payment, irrespective of the form of the indebtedness, and though they do not prove their claim. They are in no wise bound by the Bankrupt Act. — *Ibid.*

5. Where the sellers of imported goods became bankrupt, and the purchasers paid the duties to obtain possession of the goods, they became subrogated to the rights of the United States and entitled to their priority. — *In re Kirkland*, 14 N. B. R. (Md. C. Ct.) 139.

6. And although they have proved their claim as unsecured. — *Ibid.* 157.

## PROCEEDINGS IN BANKRUPTCY.

1. Proceedings in bankruptcy supersede all other proceedings for the administration of the assets of the debtor, subject only to the priorities which are obtained by any creditors by use of diligence. — *In re Whipple*, 13 N. B. R. (N. D. Ill.) 373.

2. It is of no consequence, except in the matter of expense, whether there are two proceedings by or against the partners, or only one. Every thing is conducted in the same way, and the rights of creditors and all others are precisely the same. — *In re Morse*, 13 N. B. R. (Mass. Dist.) 376.

3. A debtor who is solvent may pay any or all of his debts, whether proceedings in bankruptcy are pending against him or not. — *In re Oregon Bulletin, &c., Co.*, 13 N. B. R. (Oregon Dist.) 503.

## PROMISSORY NOTES.

1. Notes executed and made payable in New York, but sent to Rhode Island to be there indorsed and discounted for the accommodation of the maker, are contracts of the latter State and valid, if made in conformity to the laws of that State. — *Providence County Savings Bk. v. Frost*, 13 N. B. R. (S. D. N. Y.) 356.

2. Notes given to the indorser in consideration of such indorsement are valid. — *Ibid.*

3. Where the holder of a note consents to the discharge in bankruptcy of the maker, with the assent of the indorser, he releases the indorser. — *In re McDonald*, 14 N. B. R. (W. D. Pa.) 477.

## PROOFS.

1. Partial payments, made before proof, upon notes indorsed by the bankrupt, must be applied to reduce the sum upon which a dividend can be demanded; but, when proof is once made, it is conclusive as to the amount due, and is not subject to variation by subsequent payments, unless the result would be to overpay the note. — *In re Weeks*, 13 N. B. R. (S. D. N. Y.) 263.

2. All claimants against the estate of a bankrupt are required to prove their debt, however evidenced. *Blum v. Ellis*, 13 N. B. R. (Sup. Ct. N. C.) 345.

3. Merely proving a secured claim as a general one does not waive the security. — *Hatch v. Seely*, 13 N. B. R. (Sup. Ct. Ga.) 380.

4. If a creditor has two separate claims, he may prove the one upon which no payment by way of preference has been made. — *In re Lee*, 14 N. B. R. (N. D. N. Y.) 89.

5. Upon application of an assignee to re-examine a claim already proved, the burden is upon the assignee to proceed, the creditor offering himself for examination. *In re Robinson*, 14 N. B. R. (S. D. N. Y.) 130.

6. The power of the court to authorize a creditor to withdraw a claim proved by mistake is wholly discretionary; and where no good would be likely to result to the general creditors, or any rights of property or liens be restored to the inadvertent creditor, and especially where the purpose is to continue the arrest of the debtor, which was made before petition filed, the court will not exercise it. — *In re Wiener*, 14 N. B. R. (Mass. Dist.) 218.

7. Depositions to prove claims will be rejected, if there is an insufficient statement of the consideration, or if in other respects they do not conform substantially to the Statutes and the General Orders. — *In re Port Hudson Dry Dock Co.*, 14 N. B. R. (E. D. Mich.) 253.

8. An agent may make proof of debt, if he has had exclusive charge and control of the debt, and knows personally all the facts required to be sworn to in proving, and if the creditor has no personal knowledge of the facts. — *In re Watrous*, 14 N. B. R. (E. D. Mich.) 258.

9. An affidavit of proof, if altered, must be resworn to before it can be filed. — *In re Walther*, 14 N. B. R. (E. D. Mich.) 273.

10. If one partner pledges his share for the debt of the firm, proof may be made in full against the assets of the firm, before sale and application of the security. — *In re Whiting*, 14 N. B. R. (Mass. Dist.) 307.

11. The provision of § 12 of the act of June 22, 1874, in regard to proving a debt by a creditor, in case of "actual fraud" on his part, applies to any other case than where there is a recovery. — *In re Riorden*, 14 N. B. R. (S. D. N. Y.) 832.

12. Where an assignee, in a suit to recover a preference, had submitted his proofs, and the defendant had put in a large amount of testimony, but, before he rested, surrendered to the assignee the entire amount received from the bankrupt which was received by the assignee, and a stipulation made by him to discontinue the suit, the creditor had a right to prove in full the debt. — *Ibid.*

13. As a very general rule, registers should insist upon the same degree and character of proof as that demanded in a trial at law or hearing in equity; though exceptional cases, free from all suspicion, might justify a less degree of proof. — *In re Northern Iron Co.*, 14 N. B. R. (E. D. Mich. C. Ct.) 356.

14. The mere fact that a managing officer of a corporation presents a claim for proof does not necessarily throw any considerable suspicion upon it. If a *bona fide* creditor, he has the same right to vote in the choice of assignee as any other creditor. But, if the register has suspicions, his duty is to postpone the proof. Such suspicion arises when the claim is not susceptible of a ready and simple explanation, and the register is not called upon to unravel complicated and suspicious transactions. — *Ibid.*

15. In order to justify the postponement of proof of a claim till after the election of an assignee, it is not required that the register should be satisfied or have before him positive evidence that the claim is invalid, or that the creditor has no right to prove it. Upon facts and circumstances being laid before him which create in his mind a substantial doubt upon the question of validity, or of the creditor's right, it is his duty to postpone the claim for investigation. — *In re Jackson*, 14 N. B. R. (E. D. Wis.) 449.

16. The doubt in the mind of the register should be a reasonable, substantial doubt, resulting from a judicial consideration of the question: he cannot postpone upon mere objections. — *Ibid.*

17. Where the power of the postponement of the proof of a claim is erroneously exercised by the register, the creditors prejudiced may have the judgment of the court upon the question. Mere relationship is not sufficient alone, nor discrepancies between the schedule debt and the debt offered for proof. — *Ibid.*

18. Mere absence from the State or the locality where the proof is made is not to be regarded as alone cause for proof by an agent. — *Ibid.*

19. The court ought not to set aside proceedings, at the election of an assignee, otherwise regular, because of the irregularity of admitting a claim the exclusion of which would not have changed the result. — *Ibid.*

See ACTION, 7; PRACTICE, 14.

REASONABLE CAUSE TO BELIEVE. — See AMENDMENT, 2.

#### RECEPTOR.

1. Where property taken upon an attachment made more than four months prior to bankruptcy proceedings is placed in the hands of a receptor, a judg-

ment *in rem* may be entered against it, and, if sold, the proceeds may be levied upon in the hands of the receptor. — *Batchelder v. Putnam*, 13 N. B. R. (Sup. Ct. N. H.) 404.

2. The undertaking of a receptor to produce the property attached, to satisfy any execution that may be issued or any judgment that may be recovered, is superseded by proceedings in bankruptcy within four months after the attachment. — *Kaiser v. Richardson*, 14 N. B. R. (Com. Pl. N. Y.) 891.

#### RECEIVER.

1. Where property was wrongfully taken by an assignee from a receiver appointed under a State court, and sold under an order of the District Court, the Circuit Court set aside the sale, and ordered the property to be returned, and the purchase-money refunded. — *Davis v. Railroad Co.*, 13 N. B. R. (N. D. Fla.) 258.

2. The bankrupt court has no authority to take property out of the possession of a receiver appointed by the State court. — *Ibid.*

3. Where, upon complaint of stockholders, a State Court has appointed a receiver of the corporation, it will not, upon the subsequent bankruptcy of the corporation, discharge the receiver, and transfer the property to the hands of the assignee in bankruptcy. — *Myer v. Crystal Lake Pickling and Preserving Works*, 14 N. B. R. (C. Ct. Ill.) 9.

4. If, upon a creditor's bill, receivers have been appointed under a State court, before commencement of proceedings in bankruptcy, it will not, upon the mere motion of the assignee, surrender its jurisdiction, and turn the property over to him. — *Freeman v. Fort*, 14 N. B. R. (Sup. Ct. Ga.) 46.

5. The Court of Bankruptcy after adjudication, and before the election of an assignee, may appoint a receiver for the temporary care and custody of the estate, when special circumstances render it desirable. — *Lansing v. Manton*, 14 N. B. R. (N. D. N. Y.) 127.

6. But he cannot maintain an action to recover the value of assets of the bankrupt purchased before the bankruptcy, in alleged fraud of the act. — *Ibid.*

7. And the assignee, upon motion, will not be admitted to prosecute such suit. — *Ibid.*

#### RECORD.

It is competent for the District Court to enter an order for discharge *nunc pro tunc* omitted at the time, if no rights of third parties have intervened which could be prejudiced by making the record speak the truth. — *In re Drisco*, 14 N. B. R. (Mass. Dist. C. Ct.) 551.

See JUDGMENT, 5.

#### REGISTERS.

1. Registers may act upon uncontested petitions filed by attorneys against assignees to compel payment of their fees and disbursements, without a special order of reference. — *In re Stafford*, 13 N. B. R. (E. D. Mich.) 378.

2. The determination of a claim by a register is not conclusive, if there has been no hearing, nor the appointment of a time for hearing, though the claimant and the assignee agreed that the register should adjust it. — *Moran v. Bogert*, 14 N. B. R. (S. C. N. Y.) 393.

3. The opposing interest, which prevents the register from appointing an assignee, means not merely an interest contending by vote for the election of a particular person, but an interest in opposition to the exercise of the power of appointment by the register. — *In re Jackson*, 14 N. B. R. (E. D. Wis.) 449.

4. Where there is no choice of an assignee by the creditors, and the register announces his purpose to appoint one, distinct disclosure should be made of any opposing interest, and the register should not appoint, unless it appears beyond doubt that there is no such interest. — *Ibid.*

See ASSIGNEE, 5; MARSHAL, 2; PRACTICE, 14; PROOF, 14, 15, 17.

#### RENT.

By the law of Pennsylvania, where judgment is obtained and execution thereon placed in the sheriff's hand, but no levy made till after proceedings in bankruptcy are commenced, the landlord has a lien upon the proceeds for his rent, after deducting the execution creditor's debt. — *Barnes's Appeal*, 13 N. B. R. (Sup. Ct. Pa.) 543.

RETROACTION. — See CONSTRUCTION, 3.

REVIEW. — See CASE, 2.

#### SALE.

1. Neither the assignee nor his solicitor can purchase at an assignee's sale. — *Citizens' Bank v. Ober*, 18 N. B. R. (U. S. C. Ct. La.) 328.

2. But an agreement by such solicitor to purchase the property at a fixed price, of one who intends to bid at the sale, will not render the sale void. — *Ibid.*

3. A party who expects to bid at an assignee's sale, where the terms are cash on the day of the sale for the whole amount of the purchase-price, may agree with another party, that, in case the latter becomes the purchaser, he will sell the property to him at a named price, on terms of credit. — *Ibid.*

4. Section 25 of the Bankrupt Act (section 5063) requires that, where any portion of an estate claimed by the assignee is in dispute, it may, under order of court, be sold, after notice to the party in adverse interest. — *Ex parte Bryan*, 14 N. B. R. (E. D. Va.) 71.

5. Whether to sell or not in such case is discretionary with the court alone, and what notice to give. The sale must be public, and after public notice. — *Ibid.*

See LIEN 2; RECEIVER, 1.

SECURED CLAIM. — See PROOF, 8.

#### SETTLEMENT.

In order to defeat a settlement by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected thereby to supervene, or whose rights may supervene. — *Smith v. Vodges*, 13 N. B. R. (2 Otto) 433.

#### SET-OFF.

1. A banker who was a director in an insurance company can set off against its demand for money it deposited with him, bearing interest and pay-

able on call, the amount due on its policies issued to and held by him. — *Scammon v. Kimball*, 13 N. B. R. (U. S. Sup. Ct.) 445.

2. The company having been adjudged a bankrupt, his right to such a set-off is equally available against its assignee. — *Ibid*.

8. If drafts were deposited with a bank for collection before proceedings in bankruptcy were commenced, and collected after, the bank may apply the proceeds to the payment of its debt. — *In re Farnsworth*, 14 N. B. R. (N. D. Ill.) 148.

4. Claims which are *merely choses in action* not negotiable, and upon which the assignee must sue in the name of the assignor, do not by assignment become mutual debts or credits in the hands of the assignee, so as to become a matter of set-off within the meaning of the Bankrupt Act. — *Rollins v. Twitchell*, 14 N. B. R. (Me. Dist.) 201.

5. The purchaser of property from an assignee cannot set off a claim against the bankrupt, existing before bankruptcy. — *Moran v. Bogert*, 14 N. B. R. (S. C. N. Y.) 393.

6. But the same claim may be set off against the bankrupt's estate. — *Ibid*.

#### SEQUESTRATION.

The District Court will restrain parties from proceeding to take property out of the possession of the assignee in bankruptcy by a writ of sequestration issued from the State Court. — *Hewett v. Norton*, 13 N. B. R. (La. C. Ct.) 276.

SPECIFICATIONS. — See DISCHARGE, 4, 8, 15.

#### STATUTE.

1. Suit brought prior to Dec. 1, 1873, to recover a preference, is not affected by the amendment of June 22, 1874. — *Slafter v. Greer Turner Sugar Refining Co.*, 13 N. B. R. (N. Y. Sup. Ct.) 520.

2. The statutes authorizing assignees to recover of creditors for fraudulent payments or conveyances are not in their nature penal, and their repeal does not affect pending suits. — *Tinker v. Van Dyke*, 14 N. B. R. (E. D. Mich. C. Ct.) 112.

3. The act of June 22, 1874, purporting to amend and supplement the Bankrupt Act of 1867, must be regarded as passed subsequent to the passage of the Revised Statute; and, although referring in terms to the act of 1867, must be construed as referring to the provisions of that act, as carried into and expressed in the corresponding sections of the statutes, and as amending and supplementing the provisions of the statutes relating to bankruptcy as therein found expressed. — *In re Oregon Bulletin Printing, &c. Co.*, 14 N. B. R. (C. Ct. Oregon.) 405.

4. The Revised Statutes, for the purpose of determining their relation to other legislation at the same session, are to be regarded as passed on the 1st day of December, 1873; and all other acts passed subsequent to that date, although in fact passed before the Revised Statutes, are to be treated and enforced as subsequent statutes repealing the Revised Statutes, so far as inconsistent with them — *Ibid*.

## STATUTE OF LIMITATIONS.

1. The right of an assignee to bring an action is barred by the limitation of two years; and the fact that he did not discover the right till after the expiration of two years will not extend the time. — *Norton v. De La Villebeuve*, 13 N. B. R. (La. C. Ct.) 304.

2. This limitation applies as well to those causes of action which existed before bankruptcy, and came to the assignee by the assignment, as to those which arise after bankruptcy. — *Ibid.*

See DISCHARGE, 10.

## STAY OF PROCEEDINGS.

A power to stay proceedings in the District Court, in a bankruptcy case pending a review in this, is in the discretion of this court, and ought not to be exercised where it is not shown that the defendant will be prejudiced or seriously endangered in his rights, if the plaintiff is allowed to proceed to final judgment in the court below. — *In re Oregon Bulletin Printing and Publishing Co.*, 14 N. B. R. (C. Ct. Oregon) 394.

See DISCHARGE, 5.

SUBPENA. — See ASSIGNEE, 5.

SURRENDER. — See PROOF, 12.

## SUBROGATION.

Where a party is compelled to pay the debt of a bankrupt to protect his own rights, he will be subrogated in the place of the creditor, as a matter of course, without any agreement to that effect. — *Whithed v. Pillsbury*, 13 N. B. R. (Me. D.) 241.

See PRIORITY, 6.

## TAXATION.

Funds in the hands of assignee deposited in the Bankrupt Court are not liable to taxation by the State. — *In re Booth*, 14 N. B. R. (S. D. Ohio) 232.

TRADER. — See BANKRUPTCY.

## TRADESMAN.

1. The word "tradesman," as used in the Bankrupt Act, means substantially shop-keeper, and as such bound to keep books of account. — *In re Coté*, 14 N. B. R. (Mass Dist.) 503.

2. And it does not apply to a person who buys and sells merely by way of eking out a living which is principally earned in other ways. — *Ibid.*

## TROVER.

An action of trover will not lie by an assignee against a judgment creditor, to recover property sold on execution prior to the commencement of proceedings in bankruptcy. — *Gates v. American*, 14 N. B. R. (N. D. Ill. C. Ct.) 141.

## TRUST.

1. Where a devise of real and personal property to trustees directed them to pay the income arising therefrom to A., provided that, if he should alienate or



dispose of it, or should become bankrupt or insolvent, the trust as to him should cease and determine, and authorized them in such event to pay the income for the support of the wife and children of A.; and, if there was no wife or children, to loan and reinvest that portion of the income of the estate to the augmentation of the principal sum or capital of the estate until his decease, or till he shall have wife or children capable of receiving the trust forfeited by him; and also provided that the trustees may, at their discretion, transfer at any time, to either of the devisees, the half or any less portion of the fund, and that, after the cesser of income provided for in case of bankruptcy or other cause, it shall be lawful for, but not obligatory on, the trustees to pay to the bankrupt, or to the use of his family, so much of the income as he would have been entitled to in case the forfeiture had not happened,— *held*, that the insolvency of A. terminated all his legal vested right in the estate, and left nothing in him which could go to his creditors, or to his assignees in bankruptcy; and further, that whatever may have come to him after his bankruptcy through the voluntary action of the trustees, under the terms of the discretion reposed in them, is his lawfully, and cannot be subjected to the control of the assignee. *Nichols v. Eaton*, 13 N. B. R. (U. S. S. Ct.) 421.

2. A devise of the income from property, to cease upon the insolvency or bankruptcy of the devisee, is good; and a limitation over to his wife and children, upon the happening of such contingency, is valid, and the entire estate passes to them: but if the devise be to *him* and his wife or children, or if he has in any way a vested interest thereunder, that interest, whatever it may be, may be separated from that of his wife or children, and paid over to his assignee in bankruptcy. — *Ibid*.

#### TRUSTEE.

No case is known to the court which goes so far as to hold that an absolute discretion in the trustee — a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt — confers such an interest on the latter that he or his assignee in bankruptcy can successfully assert it in a court of equity or any other court. — *Nichols v. Eaton*, 13 N. B. R. (U. S. S. Ct.) 421.

TRUSTEES. — See MORTGAGE, 5.

#### TRUST FUND.

Where bankers were also brokers, having a separate department for that business, with separate books of account and bank deposit, which was drawn upon exclusively to answer demands in the brokerage business, and it appeared that at the time of their failure the proceeds of certain bonds were deposited to this account, and the funds were more than sufficient at the time of their failure to pay all brokerage demands, the owner of the bonds is entitled to be paid in full from that fund the price obtained by the brokers for the bonds. — *Voight v. Lewis*, 14 N. B. R. (E. D. Pa.) 543.

See PREFERENCE, 13.

UNITED STATES STATUTES. — See JURISDICTION, 7.

UNITED STATES. — See PRIORITY, 5.

USURY. — See PRACTICE, 7.

VOTE. — See COMPOSITION, 19, 25; CORPORATION, 4.

LETTERS OF ATTORNEY. — See ATTORNEY, 1; NOTARY PUBLIC, 1.

WAIVER.

A corporation, by appearing and answering to a petition for adjudication, and not making the objection that it was not a moneyed business or commercial corporation, has waived the right, and admitted that it was such a corporation as might be proceeded against in bankruptcy and adjudged a bankrupt. — *In re Oregon Bulletin, &c. Co.*, 13 N. B. R. (Oregon Dist.) 503.

See PROOF, 3.

WARRANT.

The marshal under a provisional warrant will be justified in taking property which the alleged bankrupt had transferred in fraud of the Bankrupt Act. *Stevenson v. McLaren*, 14 N. B. R. (Sup. Ct.) 403.

WIFE. — See WITNESS, 2.

WITHDRAWING CLAIM. — See PROOF, 6.

WITNESS.

1. Upon re-examination, a witness cannot be asked if he made a certain statement, because leading. — *Ives v. Tregent*, 14 N. B. R. (Sup. Ct. Mich.) 60.

2. The bankrupt may testify in support of the wife's claim against his estate, if the laws of the State prior to Dec. 1, 1873, rendered such testimony competent. — *In re Bean*, 14 N. B. R. (E. D. Pa.) 182.

3. Under sections 5003 and 5087 Revised Statutes, a commission may issue from the District Court of one State to take the testimony of a witness in another State; and the Circuit Court of the latter State may compel the attendance of the witness, and, upon refusal to answer, punish as for contempt. — *In re Johnston*, 14 N. B. R. (N. D. Ill.) 569.

WORKMEN. — See COMPOSITION, 25.

## BOOK NOTICES.

*Die Vorbereitung der mündlichen Verhandlung nach dem gegenwärtigen Stande der Civilprocessgesetzgebung.* Von Dr. PHILIP HARRAS RITTER VON HARRASOWSKY. Berlin: Franz Vahlen. 1875.

THE theory of Dr. Von Harrasowsky seems to be that the whole civilized world ought to have one system of law, just as there ought some day to be one language, which educated persons of all nations shall agree to use. This theory is to be put in practice through a careful comparison of all systems of law now in vogue, a careful extraction and classification of all commonly accepted principles, and the construction from these principles of a system adapted for universal use. So vast a work as this could only be carried out by the resources of government, and the volume before us is simply the contribution of an individual dealing in the manner suggested with a very limited portion of the law. To reform modern law by the slow but sure and scientific processes of comparative jurisprudence is characteristic of the continental, and above all of the German jurist. The eclecticism which gives a practical value to this method in Europe would be hardly possible in this country or in England, where the law is purely indigenous, and has gone hand in hand with the history of the race. We would not be understood to mean by this, that the study of comparative jurisprudence is not of essential value to the American or English law reformer. On the contrary, the tendency to neglect this important science is to be deplored. But, while it is feasible to introduce with advantage a purely eclectic legal system among the continental nations, it would be disastrous in the domain of the common law. Healthy reforms in that system must come by the slow processes of time, and must be made cautiously and without haste. The difficulty and confusion produced, by too violent or too sweeping revolutions in the administration of the Anglo-Saxon system, have been but too well illustrated by the results of the New York Code and of the recent wholesale reforms in England. "They stumble that run fast," is especially true of English and American law reformers.

Dr. Von Harrasowsky has confined himself in the present instance to a branch of procedure, and, in pursuance of his theory, has laid under contribution all the legal systems now existing between here and Tartary. The usual care and accuracy of German work are apparent, but the research has been by no means exhaustive, if we may judge from the pages devoted to England and the United States. An author can hardly be said to have sounded all the legal depths and shoals in our own country, whose only authorities apparently, have been Kent, some statistics furnished by the Austrian Embassy, a brief of David Dudley Field's, and the code of procedure of the State of New York. A page on the procedure of the United States courts, and five upon the New York procedure, constitute all the material extracted by Dr. Von Harrasowsky from our systems. England, Ireland, Scotland, and India fare a little better, but yet are allowed less than twenty pages. When it is remembered that

Great Britain and the United States are the sole representatives of one of the two great legal systems of the world, twenty-five pages, in a book of two hundred, seem but scant allowance for a proper treatment of their methods of procedure.

Dr. Von Harrasowsky adds a few pages of conclusions drawn from the material which he has collected. He classifies his results in a number of subdivisions under three general heads: I. The participation of the parties to a suit in the procedure; II. The regulation of the course of procedure; III. The steps preliminary to the procedure. We have not space to examine the various results classified under those heads, but we are obliged to say that Dr. Von Harrasowsky's conclusions appear to us neither very clear nor very valuable. Nevertheless, the attempt to improve the Austrian system, even in a limited way by a comparison of other national systems, must be liberalizing and improving.

*A Treatise on the Law of Mortgages of Real and Personal Property in the State of New York, with an appendix of forms.* By ABNER C. THOMAS. New York: Baker, Voorhis, & Co.

MR. THOMAS must be a disciple of Artemus Ward. He tells us in his preface that, because mortgages are in New York "almost as common as absolute conveyances," we may be certain that the law governing them was wisely framed and is justly administered; one of the special indications of which is that chattel mortgages "are regarded with favor by failing debtors who desire to shield their property." This touch of humor excited our expectations; but we were deluded. We saw nothing more to remind us of that good and patriotic man, who, to save the just laws of his country, including those of chattel mortgage, was willing to sacrifice all of his wife's relations upon the altar of his native land.

The book before us consists of forty-one chapters, and an appendix of forms, and, so far as we can judge from the subjects and sub-heads of the chapters, appears to contain a full consideration of the New York law of mortgages. As mortgages are so largely regulated by statute, we think the author has done well to limit himself to a statement of the law of his own state, especially since the subject has there been elaborated very fully by the courts. This limit upon his work gave him the opportunity of presenting and illustrating every phase of the domestic law on this important subject. If this opportunity has been improved faithfully, the book must take precedence in New York of all foreign works, and, at the same time, become a useful work of reference in other states.

Mr. Thomas has not deemed an orderly arrangement of his book of great importance. In chapter iv., for example, he considers who may mortgage and how; and in chapter xiv. he treats of married women. Again, two or three chapters on the validity of mortgages are placed near the end of the book, after chapters on redemption and foreclosure. However, defects of this kind are not fatal: they only affect a book artistically. They are not even conclusive evidence of loose methods of thinking.

This, at all events, is the way we had put aside the suggestion of doubt which arose upon a glance at the contents of the book. But we found unmistakable evidence of confusion of statement in the first chapter we read. After

an introduction on the history of mortgages, our author has a very useful chapter on the difference between conditional sales and mortgages; in the very first paragraph of which he confuses conditional sales and sales with liberty of repurchase. He makes them practically synonymous; and this confusion runs through the chapter. Mr. Thomas certainly falls short of any great success in his attempt at analysis and the clear statement of distinctions.

In other respects, much may be said in commendation of the work. The marks of care and industry are everywhere apparent. The doctrines of the authorities are stated well and fully; and the subject itself appears to have received attention in all its branches and in many cases in its minutest details.

We cannot lay aside the book without indulging in some reflections of a historical kind, suggested by the introductory chapter of Mr. Thomas. Referring to Mr. Coote, he tells us (p. 3) that it is a matter of doubt whether mortgages were known to the Anglo-Saxons. If our author had taken the trouble to look into the learned essay on Anglo-Saxon Land Law, by Mr. Lodge (*Anglo-Saxon Law*, pp. 106, 107), he would have found positive evidence upon the subject. Two interesting charters of the tenth century are there referred to, in which lands were conveyed in mortgage. Many other instances might be mentioned; enough indeed to show that the practice was common.

In the first volume alone of *Doomsday*, Book I., there are no less than twenty-three references to mortgages, most of them, certainly, of the time of Edward the Confessor. We quote two or three of these: *Hanc terram tenuit Leuvin teignus regis in uadimonio, tempore Regis Eduardi. Sed postquam Rex Willielmus venit in Angliam, ille ipse qui inuadiauit hanc terram redemit, et Seihier eam occupauit super regem, ut homines de hundredo testantur. 1 Doomsd. 215 b. Huic manerio pertinet una vergata terræ quam Aluric habuit in uadimonio pro dimidio marki auri, et necdum est redempta. Ib. 75 b.* In the *Inquisitio Com. Cantab.* containing the original returns from which *Doomsday* for Cambridge was compiled, p. 3, is the following: *Ipse Orgarus hanc terram in uadimonio pro vii. markis auri et duabus unciiis, ut homines Gaufridi dicunt, et de hundredo homines neque breue aliquod nuntium de rege.*

Some of these mortgages continued in force after the Conquest; and *Doomsday* shows that the practice of making them continued under the Conqueror.

It may be of interest to Mr. Thomas that the cases of mortgage in *Doomsday*, as well as the language of the *Regiam Majestatem* and of the Grand Customier of Normandy, confirm the definition of the term "mortgage," or "dead pledge," given by Glanvill; to wit, "A pledge is designated by the term mortgage when the fruits and rents which are received in the interval in no measure tend to reduce the demand for which the pledge has been given, p. 252, Beame's ed., and note. See also *Anglo-Saxon Law*, p. 106.

*Civil Malpractice.* A Treatise on Surgical Jurisprudence, with Chapters on Skill in Diagnosis and Treatment, Prognosis in Fractures, and on Negligence. By MILO A. MCCLELLAND, M. D. New York: Hurd & Houghton. Boston: H. O. Houghton & Co. 1877.

THIS work is addressed to members both of the medical and the legal professions. Of its value to the former we shall not venture to speak, though

we should think that some of them might be interested to learn just what measure of skill they must possess in order to satisfy the requirements of the law and to discover what sort of rulings they might expect from the courts on this point, and also in the matter of damages should they or their friends ever have the misfortune to be parties defendant in a suit for malpractice. But it is impossible to suppose that the legal fraternity have ever deeply mourned the non-existence of a work upon this topic, or that they will find any great void in their libraries satisfactorily filled by this volume. We should wish to speak civilly of it, since the author, or more properly the compiler, has dealt with the "pribbles and prabbles" of the legal profession much more kindly and liberally than physicians are apt to do. But the truth is that the principles which are declared and illustrated in this book are neither sufficiently numerous, complicated, or obscure, to require some five hundred and thirty pages of text for setting them forth with abundant fulness. It is hardly worth while to print at full length many opinions of judges, all going to the elucidation of one and the same quite simple rule of law. Nor does it affect this consideration that the opinions were delivered in causes growing out of different descriptions of illness or accident. The same general rule as to care and skill, or as to the measure of damages, must be laid down where the difficulty has been a sprained ankle as where it has been a broken arm or an accouchement. Neither can an accumulation of the testimony of several experts, as to the line of treatment pursued or which should have been pursued in any given cause, be a matter of any interest to lawyers. The facts and evidence in each individual case must be altogether independent of the facts and evidence in any other case, and must be established by the physicians summoned for that especial trial, nor does the enunciation of the general rules of law for the guidance of the jury vary with the medical theories advanced. A great deal, therefore, of this book could be cut away without in the least detracting from its legal value. Doubtless, a very useful treatise could be made out of the statements and the collection of judicial opinions herein brought together, by pruning redundancies, cutting out altogether some reproductions of testimony, citing the illustrations and authorities for a principle, instead of giving them all at full length; in short, studying the subject thoroughly and then writing of it in a philosophical manner. But there has been no effort at this; there has been only a massing together of raw material. It would not perhaps have gratified the author, after having performed probably three times the labor which he has now expended, to find the result not exceeding in actual bulk one-third of the present comely volume. But, had he submitted to this mortification of the spirit, the legal profession would have been under much greater obligation to him. Perhaps it is a fair inference that a book which contains too much has at least no faults of omission.

The spirit and tone of Dr. McClelland are generally moderate and candid, and in this feature we are much pleased with his labors. He has no toleration for quacks, however, and one paragraph, in which he undertakes to explain the marks by which these lawless skirmishers may be distinguished from the army of regulars, gave us so much honest amusement that we cannot refrain from making an excerpt, not at all as a specimen of the book (which it is not), but in order that our readers may enjoy as good a laugh as we did. "Those may

surely be regarded as quacks," says the Doctor, quoting in part from Hahne-mann's Treatise on Chronic Diseases, "who assure us in their therapeutics that the administration of the 1,000,000,000,000,000,000,000 of a grain of carbonate of lime—common chalk—produces no less than a thousand and ninety symptoms, from which I select the following: 'On the fifth day, itching on the border of the eyelids; thirteenth day, in the evening, on going out, unsteady gait; seventeenth day, ardent venereal desires, especially during a walk before dinner; twenty-first day, great heat at the extremity of the big toe; twenty-eighth day, itching at the anterior part of the glans penis, after urination, and so on *ad nauseam*.'"

*Reports of Cases determined in the Circuit Court of the United States for the First Circuit.* JABEZ S. HOLMES, Reporter. Vol. I. Boston: Little, Brown, & Co. 1877.

THIS volume contains cases decided by Judge Shepley from July 1870 to June 1875, and a few opinions of Judge Lowell. The decisions of Mr. Justice Clifford are not to be published in this series of reports.

Of the merits of Mr. Holmes, as a reporter, it is perhaps too soon to express a very decided opinion, and we prefer to suspend our judgment for the present. We have, however, noticed certain matters in this volume which may, we think, well be avoided in the next.

The plan adopted by Judge Shepley of generally stating the essential facts of a case, or what he considers to be such, in the opinion, relieves the reporter of much labor in condensing the record, on which the case comes before the court; but cannot excuse his neglect to make any examination of it. What seems to be an instance of such neglect occurs in the case of *O'Connor v. Lang*, p. 248, where the opinion, after discussing several of the main questions involved, proceeds as follows: "After a careful revision of the exceptions, I see no reason to doubt the correctness of the judgment of the District Court overruling the exceptions and confirming the report of the commissioner." The questions raised by the exceptions were not those previously discussed in the opinion; but the reporter has entirely omitted to state what the questions were. The head-note of this case is also defective. It states a general principle of law which was not controverted. The question was, whether, under the peculiar facts of the case, the stranding was voluntary within the rule.

We regret to see that Mr. Holmes has adopted the style of entitling actions *in rem* as if they were *in personam*. Now that the plan of giving the name of the *res* alone so universally prevails, we trust that, in his next volume he will not see fit to remain a disciple in the school of Mr. Howard.

There are several cases in this volume which have since been overruled by the Supreme Court of the United States, and the fact is stated by the reporter in a note. But why should these cases incumber the book? They are now of no authority anywhere. So too, ten pages are wasted in reporting the arguments of counsel and the opinion of the court in the case of *Florence Sewing-Machine Co. v. Grover & Baker Sewing-Machine Co.*, p. 235. The reporter has omitted to state the fact that the precise point was decided the other way by the Supreme Court of the United States, in 18 Wall. 553.

In some cases, we notice the names of counsel who certainly took no part in the argument, and who have not been in court for years. This happens, we suppose, because Mr. Holmes followed the firm names printed on the briefs, without knowing or ascertaining by whom the argument was made. We would also suggest that a uniform mode of citing the names of counsel should be adopted. Some reporters designate the christian name by the initial letter thereof; others give the name in full. One or the other style should be adopted and adhered to.

We have but little space left to notice the cases decided. Most of them relate to the law of patents, and range from "corsets and abdominal supporters," through "refrigerators" and "elevators," to "improvements in coffin-lids."

*Simpson v. Pacific Ins. Co.*, p. 136, is an interesting case on the question of what constitutes an arrival of a vessel at a port. It may be read with profit in connection with *Bramhall v. Sun Ins. Co.*, 104 Mass. 510.

*Osgood v. Allen*, p. 185, is an important case on the law of copyright applicable to the title of a magazine.

*Morse v. Massachusetts National Bank*, p. 209, decides that an oral promise by a bank, which has no funds of the drawer of a check, made to the payee thereof, to pay the check if deposited in another bank, so that it will come through the clearing-house, is within the statute of frauds.

*Donaldson v. McDowell*, p. 290, or, as it should be entitled, *The Hyperion's Cargo*, decides that a cargo is liable *in rem* for demurrage, if a delay is occasioned by the fault of the consignor or consignee, although the bill of lading contains no demurrage clause.

*Mathews v. Massachusetts National Bank*, p. 396, decides that the signing a transfer in blank on a certificate of stock by the cashier of a bank, on the payment to the bank of a loan, for which the certificate was pledged as collateral security, is a warranty to a subsequent taker of the genuineness of the certificate.

One of the most interesting cases in the volume is that of *Swift v. Brownell*, p. 467. Some of the questions decided are entirely new. The *Helen Mar* and the *Ontario*, two whalers, came into collision in the Arctic Ocean. The *Ontario* was lost and the *Helen Mar* much injured. Both vessels were held in fault. One question was how the value of the oil and bone on the *Ontario* was to be ascertained. There was no market value for it at the place of the injury, and the value at New Bedford less the freight, insurance, and other usual charges, was held to be the rule in both the district and circuit courts. There was, however, a difference of opinion on the question when this value was to be estimated. Judge Lowell held that it was to be on the day of the collision. Judge Shepley held that it was to be on the day when it would probably have arrived, had it been shipped at once. Two questions of interest arose under the United States Statute of 1851, limiting the liability of the owners. First, whether whaling equipment was included in the term "ship;" and, second, whether in the case of a whaler there could be said to be "freight pending." Both questions were decided in the negative.



*Commentaries on Equity Jurisprudence as Administered in England and America.*

By JOSEPH STORY, LL.D. 12th Edition. Carefully revised with Notes and New Cases added. By JAIRUS W. PERRY. In two volumes. Boston: Little, Brown, & Co. 1877.

WE have so recently published a notice of this admirable work [Am. Law Rev. Vol. 8, p. 593], the eleventh edition having issued from the press only a few years ago, that we feel called upon now to add but a few words. As to the merits of the work itself we heartily indorse what Mr. Perry says in his preface to this edition, and we believe that he but records the verdict of the profession, when he says "eleven large editions of this work have been absorbed into the literature of the law. After such an indorsement, it seems little short of presumption either to criticise or commend it; but a careful study of the book in the preparation of this edition, as well as a study for many years of many of the topics embraced in it, emboldens the editor to say that this treatise is a wonderful exposition of the jurisprudence of equity. . . . It is an enduring monument to the industry, learning, and genius of its distinguished author." That Mr. Perry, who is so well and favorably known to the profession, through his able and thorough work on "Trusts," should have devoted so much time and labor to the preparation of a new edition of this book, instead of pursuing his work of original composition, is a strong tribute to the value of Judge Story's commentaries.

We are obliged, however, to differ completely from Mr. Perry, as to the arrangement of this work, on two points. In these only, we think his work open to criticism. On the first matter we state our opinion with reluctance, but we believe that we represent the general feeling of the profession in saying that we consider Judge Redfield's action in interpolating into the body of the work, as a part of the text, his own florid notes, wholly unwarrantable. We have been hoping for many years that some editor would relegate to their proper position these ambitious additions. Mr. Perry has, however, hesitated to do so for the reason, which he has stated in his preface, that it "would tend to overwhelm the text with notes." We cannot consider this reason sufficient. The additions are in fact notes, and should be printed as such. As a portion of the text, they certainly are more likely to overwhelm it than if they were presented to the reader in their proper position of subordination. The difficulty which Mr. Perry seeks to avoid might better be met by liberal omissions, and we hope that Mr. Perry's successor in the trust will be more energetic in this regard.

The other point on which we differ from Mr. Perry is of less importance, but we think that his course in making the notes of all the previous editors indistinguishable is not wholly satisfactory. He says in his preface that he does not think it important to "distinguish the notes of mere editors from each other." Applying this theory to his own case we think him too modest by half. The knowledge of the authorship of a note is sometimes of great value. Even if notes have been prepared with equal care, still they represent the results of researches made by men of different ages, capacities, and habits of thought, and their authority with the profession depends in great measure upon the character and reputation of their author.

The mechanical execution of the book is admirable, and the editor's new

arrangement of the notes has enabled him greatly to increase the contents of the book while the bulk is actually decreased. Mr. Perry has added to the authorities previously cited, nearly nine hundred cases, selected from the latest and most important decisions.

*The Legislation of the German Empire; with Explanatory Notes, &c. Part III. Criminal Law.* Vol. II. No. 4. Containing the Penal Laws of February 26, 1876. With a Commentary. By OSCAR MEVES K., Appellations-gerichtsrath.

THIS work has already been noticed in this Review, and its general scope and objects were then pointed out. The number now before us is devoted to certain articles of the penal code. The subject of the first clause discussed (section 361, article I.) deals with a kind of legislation as yet very strange and rather awful to the majority of respectable Americans. Freely translated the provision in question reads, "If any woman, who as a professed prostitute is subject to the supervision of the police, violates any of the police directions made in this respect for the preservation of health, of public order, and of public decency, or if she shall exercise her profession of prostitute without such supervision, she shall be punished with imprisonment," &c. There is a cold realism about the language of the statute which brings home very forcibly the foreign method of dealing with one of our great social problems. Other provisions discussed in this number treat of the use of false papers, such as passports, naturalization certificates, and the like; of false weights and measures; of the removal of earth, stones, &c., from the land of an individual, or from the highway; of taking pledges from soldiers without leave of the commanding officer, — a serious offence and characteristic of a great military power; of penalties to foreigners fishing off the German coast; and of the responsibility of parents, guardians, and masters.

There is a curiously paternal atmosphere about the wording of many of these laws, and they give the reader a strong sensation of the existence of an omnipresent and vigilant police, all of which is increased by the chance appearance of "Wilhelm, Fürst v. Bismarck" at the conclusion of the last article. The paternal care of the laws is illustrated by the clause relating to locksmiths: "Any locksmith, who, without the direction of a magistrate, or without the approbation of the tenant of a dwelling, manufactures keys for the rooms or chambers in the said dwelling, or who, to open the lock in the same, manufactures a door-key without the approbation of the householder or of his representative, or who, without the permission of the chief of police, furnishes a double key or pick-lock, shall be punished," &c. It does not lie in our mouth, however, to carp at such a law as this as meddling or paternal, when the remembrance of certain liquor laws is still so fresh.

We have left ourselves but little space to speak of the commentary which accompanies the laws. Herr Meves has performed his work conscientiously, learnedly, and not at too great length. The commentary is a commentary pure and simple. That is to say, it gives a short history of the particular law, and the explanations and criticisms of the commentator as to its purport and value. The multitude of cases which would fill the pages of such a work in this country are spared to the Germans. To add that the method is good,

and the indexing complete, is simply to say that the book has the characteristics common to all first-rate German work.

*Reports of Cases Argued and Determined in the Supreme Court of the State of Wisconsin.* With Tables of the Cases and Principal Matters. O. M. CONOVER, Official Reporter. Volume XL. Containing cases determined at the January and August Terms, 1876, with the Rules of the Supreme Court, adopted August 15, 1876. Chicago: Callaghan & Co. 1877.

WE have often had occasion to commend the general excellence of these reports, and the promptness with which they are laid before the public. The present volume contains all the cases but one which were "ripe for reporting," as the preface phrases it, up to the first of February. Of these the most important is *State ex rel. Drake v. Doyle*, p. 175, which was a new attempt to enforce the State statute requiring foreign insurance companies, as a condition precedent to doing business within the State, to agree not to remove into the United States courts any actions brought against them in State courts. It was held by the Supreme Court of the United States, in *Home Ins. Co. v. Morse*, 20 Wall. 445, reversing the judgment of the Supreme Court of Wisconsin, that such an agreement could not constitutionally be invoked to prevent a removal. But the laws of the State further provided that if any company should attempt to remove an action, contrary to its agreement, it should "be the imperative duty of the Secretary of State to revoke any license to such company to do any business in the State;" and the present case was an application for a *mandamus* to compel the Secretary to revoke the license of one of these contumacious companies, which had not only removed an action into the United States Circuit Court, but had procured an injunction out of that court to restrain the Secretary from revoking its license. It was held by the State Supreme Court, after full argument, that the statute requiring the agreement not to remove was constitutional; that the United States Supreme Court had not held otherwise, their judgment establishing only that the statute could not be enforced specifically by a denial of the right of removal, and not determining that any penalty for its breach could not be enforced; that the Secretary had no discretion as to revoking the license, and was compellable by *mandamus* to act; that any citizen might prosecute the writ for that purpose; and that the injunction granted by the United States Court against the Secretary was in effect an injunction against the State, and so unconstitutional and void; and a peremptory *mandamus* was awarded and obeyed.

Two charity cases in this volume are also of interest: *Ruth v. Oberbrunner*, p. 238, and *Heiss v. Murphey*, p. 276. It would seem that the statutes of Wisconsin, like those of New York, confine trusts within very narrow limits, and require them to be expressed with great particularity in order to be valid; and the court disclaims any power of executing them *cy près*.

In *Bromley v. Goodrich*, p. 131, the doctrine of *Brigham v. Clafin*, 31 Wis. 607, is strongly reaffirmed, the Court holding, contrary to the weight of opinion elsewhere, that a State court has no jurisdiction to avoid a conveyance as being in fraud of the Bankrupt Act.

*Watkins v. Blatschinski*, p. 347, is an extreme case of equitable conversion, exempting the purchase-money due for a homestead estate sold, from garnishment in the hands of a purchaser in a suit against the vendor.

The reporter's practice of prefixing to each head-note a short title, showing the general subject of the case, as is done in the English reports, is convenient, but needs to be done carefully. In *Mohr v. Tulip*, p. 86, we find the startling title, "Guardian's Sale of Real Estate; Mortgage of Lunatic." The desperate shifts of that guardian to raise money on the person as well as the property of his ward might well be the subject of inquiry by a court.

*A Treatise on the Law and Practice of Voluntary Assignment for the Benefit of Creditors.* By ALEXANDER M. BURRILL. Third Edition, by JAMES L. BISHOP. New York: Baker, Voorhis, & Co. 1877.

THE United States Bankrupt Law is still in a certain sense upon its trial. Its efficiency as a means of preventing fraud has so far been impaired by the amendments of 1874, that as it stands it fails to secure one main object of all bankruptcy systems. The large expenses which attend its operation, the frequent recourse of dishonest debtors to its shelter, and the slender results which it yields to creditors, have created in many minds a blind hostility to any bankrupt law; and whether the agitation for a change, which must surely come, will result in amendment, which is desirable, or in repeal, which is not, can hardly be predicted.

This new edition of Mr. Burrill's careful work comes therefore very seasonably to set forth the rules and practical mode of operating a simpler system of insolvent administration. The practice of voluntary assignments, to which the sanction and shape of statutory enactment was very generally given, though interrupted for a time by the United States bankrupt laws of 1842 and 1867, has always kept its place, as a cheaper and more rapid mode of settling the debtor's estate, where his honesty is unquestioned.

Upon the passage of local insolvent laws, the courts were at first inclined to restrict very much the statutory system of voluntary assignment; but a more liberal interpretation was soon applied. A noticeable example of this may be found in our own courts, in comparing the language of SHAW, C. J., in *Wyles v. Beals*, 1 Gray, 233, 236, 237, with the views of the same learned judge in the later case of *Edwards v. Mitchell*, ib. 239. See also *National Mechanics' & Traders' Bank v. Eagle Sugar Refinery*, 109 Mass. 38, 39, where the subject is ably reviewed by Mr. Justice Wells.

Mr. Burrill's book was originally well written, and presented its matter in a clear and concise style, but in a manner that somewhat suggested a paucity of material. The present edition shows marked signs of improvement in this particular, and many valuable additions in text and notes have been made, and it would doubtless have been marked by even greater changes if the editor had felt free to deal with the text as Mr. Burrill himself would have done. In presenting a treatise on what certainly is, in effect, a rival system to that of bankruptcy, it would not have been amiss to have incorporated more matter drawn from independent branches of law, which was connected with or collaterally involved in the discussion and presentment of the topics immediately treated.

As it is, however, we have in this compact and satisfactory treatise a reliable guide in the many and difficult questions which attend the settlement, without suit, of an insolvent estate. The faithful accuracy of Mr. Burrill in statement

and citation has been imitated by his editor; and the neat execution of the mechanical part of the work is an additional recommendation in its favor.

*A Treatise on Trial by Jury, including Questions of Law and Fact, with an introductory chapter on the Origin and History of Jury Trial.* By JOHN PROFFATT, LL.B., author of "Curiosities and Law of Wills," &c. San Francisco: Sumner Whitney, & Co. New York: Hurd & Houghton. Cambridge: The Riverside Press. 1877.

THE bulk of this volume consists of a manual of practice on all matters concerning a jury trial, from the selection and summoning of the jury to its final discharge at the end of the trial. There are preceding chapters on the different kinds of juries and on the right to trial by jury, and the whole is introduced by an essay on the origin and history of the jury. In the preface, the author calls attention to the fact that it is a first attempt to give in one work the law applicable to all proceedings connected with the jury, together with a history of the institution, and he craves the indulgence of the public on that ground. There seems no good reason why a historical treatise should be bound up in the same covers with a manual of practice, and an examination of the book shows that the two parts meet with very unequal treatment, and suggests anew that for historical work a very different sort of talent is demanded from that sufficing to produce a useful manual. But although Mr. Proffatt's historical introduction is not in itself a masterly production, his painstaking reading in the history of his subject, appears for good in the subsequent part of his book. There is a certain modesty in giving so-called "reasons" for the institution as it presents itself in its various aspects in modern times, and a want of flippancy in accounting *a priori* and according to broad principles of humanity for some of its peculiarities, which are in refreshing contrast to much of the confident buncombe put forth by the majority of writers on this venerable institution. But, although Mr. Proffatt's historical studies have had the effect of improving in a general way that portion of his book designed as a manual of practice, it must be admitted that it would have been better if he had omitted his introductory chapter. As a manual of practice, the book leaves very little to be desired. There is perhaps too much space devoted to advising counsel as to the most effective manner of conducting a case, illustrated by copious quotations from Cicero, Mr. Forsyth's "Hortensius," and works on the Duties of Advocates, but in general the ground is well covered and no more. A vast number of cases are pertinently cited illustrating the many points that are likely to arise in a lawyer's jury practice, about which he requires immediate information. Not only are the older cases, already to be found in the books, duly incorporated, but the latest decisions also find their due place.

If we examine the historical part, the result is less satisfactory. What, for instance, should we think, if, in treating the question of libel, the author had indeed given the case of the Dean of St. Asaph at length, but had made no allusion to Fox's Libel Act, or to the various decisions under that or similar legislation? We should certainly hold that to be a very defective presentation of the subject of libel in its relations to trial by jury. Yet the author's essay on the origin of the jury is no more satisfactory than a chapter on the

function of the jury in libel suits would be if it left off with the case of the Dean of St. Asaph.

The author seems to have read some of the older literature on the subject, and to have attempted a study of some of the original sources of information ; but, from ignorance of the results of modern critical studies, he has failed to interpret the original authorities correctly, and we find him successively laboring to see the jury in certain passages in the Anglo-Saxon laws which have been proved now more than once to authorize no such conclusion ; coquetting with Finlason's Roman derivation ; and even discoursing about the Athenian Dikasts, after the manner of Pettingall and Zeutner. This is not the place to consider the question of the origin of the jury. The present state of inquiry on that subject was set forth in a late number of this *Review* (October, 1876), in connection with a review of Brunner's exhaustive work on the subject. It may not be too much to hope that any one who shall in future attempt this troublesome point of legal history will have read Brunner's book, or, at least, the remarks of Professor Stubbs on the subject in his *Constitutional History of England*. In legal history, it is above all important to know and take advantage of what has already been done.

*Reports of Selected Civil and Criminal Cases decided in the Court of Appeals of Kentucky.* By W. P. D. BUSH, Reporter. Vol. XI. Louisville, Ky.: John P. Morton & Co. 1876.

This volume contains decisions rendered in the latter part of 1874, in 1875, and in the early part of 1876.

The reporting is upon the method hitherto pursued in this series. The facts are given by the court, — sometimes in rather a diffuse and colloquial manner, — and the reporter adds a list of cases cited by counsel, in one case extending his enumerations through seven pages. The arguments of counsel are never given.

There are few cases to be selected as of special interest.

In *Buford v. Speed*, p. 338, the court allows a contract made with a public enemy to be enforced.

Buford, the defendant in the original action, was in the Confederate army; and, while he was absent upon service, proceedings were instituted to enforce confiscation of his property in Kentucky. His wife, who remained in Kentucky, employed Speed to protect her husband's interests in that property; and Speed brought an action to recover his fees from Buford. The court hold that the wife, even though acting without express authority, bound her husband, her authority being, "*ex necessitate rei*, by implication of law." Furthermore, it being established by the United States Supreme Court that a public enemy may have standing in court to protect his property when threatened with confiscation; the court, in this case, holds it to be a necessary consequence that he may employ counsel, and that such counsel may recover his fees.

It would seem clear that, if the enemy himself may be recognized, his counsel may be. But that the counsel may recover his fees is a proposition hardly so indisputable as the court assumes.

In *Gaar, &c. v. Louisville Banking Co.*, p. 180, an action was brought

upon a bill of exchange, drawn upon its face in the ordinary form, but bearing upon its back an agreement, signed by drawer, acceptors, and two indorsers, binding them to pay attorney's fees, if any holder should bring suit upon the bill.

It was objected by those indorsers that the bill was not negotiable, since it included attorney's fees, and was, therefore, for an uncertain amount.

The court holds that, since the amount to be paid at maturity is definite, the negotiability of the instrument is not affected by the uncertainty which attaches to it after maturity.

*Cases Argued and Determined in the Circuit Courts of the United States for the Fifth Judicial Circuit.* Reported by WILLIAM B. WOODS, the Circuit Judge. Vol. II. Chicago: Callaghan & Co., Law Book Publishers, 1876.

THE extent of the fifth circuit, the number of districts into which it is necessarily divided, and the consequent multiplication of terms, must render the duties of the circuit judge exceedingly arduous; and we are surprised that Judge Woods is able to issue his second volume of reports so promptly. It contains decisions of the Circuit Court rendered in nine different districts, and includes cases decided at terms held in the spring and early summer of 1876. Many of the opinions reported are those of Mr. Justice Bradley, but in a majority of the cases the opinion is given by Judge Woods, a few opinions by the district judges being included. In many cases, the report consists only of head-note and opinion, but a statement of facts and a summary of the arguments are added wherever the reporter thought it necessary to an understanding of the case. As a rule, it seems to us better that a judge should not be his own reporter. A case is more likely to be presented accurately by an indifferent person than by one who, having decided it, is apt in reporting to overlook facts which, in his judgment, are immaterial. An opinion is frequently an argument, which presents one side of a case. A good reporter will make it apparent that both sides were presented to the court. We make these remarks without intending at all to reflect on Judge Woods, whose reporting strikes us as very good, but rather as a protest against the practice, not uncommon among reporters, of relying too implicitly on the statement of facts contained in the opinion.

The decisions reported in this volume discuss very various, and, in a large proportion of cases, very important questions. The reader will gather from it an accurate idea of the condition of the Southern States, for the cases tell a monotonous tale of financial disaster. Suits by the holders of municipal bonds to enforce the payment of interest or principal, or to compel State officers to levy a tax for the purpose; and bills in equity, brought by bondholders, to foreclose their mortgages on bankrupt railroads, fill many of its pages; and the opinions in these cases are valuable contributions to the law. We recognize among the parties to these suits not a few familiar names, associated either with the political or financial history of the last ten years, and are furnished with abundant opportunities for learning how easy it is to persuade even careful men to make hopelessly bad investments. "The Yahoola River and Cane Creek Hydraulic Hose Mining Company" is a name

which to-day would hardly attract the conservative investor, but in its time it fascinated many; and, as our eye fell upon its name, somewhat abbreviated, occurring in the title of a case, it struck us as a fair type of the financial adventures, whose failure has helped largely to increase the labors of Judge Woods.

There are many cases which we should be glad to mention, but selection is difficult and our space is limited. We believe our readers will find the volume interesting and valuable.

*A Treatise on the Law of Evidence.* By SIMON GREENLEAF, LL.D., Emeritus Professor of Law in Harvard University. Thirteenth edition. Carefully revised, with large additions. By JOHN WILDER MAY. Vols. II. and III.

VOLUME I. of this work, by Mr. May, was noticed in the *American Law Review* for January, 1877. Volumes II. and III. have been received since our January number went to press.

As is well known the first volume is devoted to the general rules of evidence, — the two last to evidence as applied to particular actions. The subjects discussed in these volumes are quite as appropriately treated in books upon procedure as in those on evidence, and are eliminated by writers like Stephen from treatises which discuss evidence and that alone. The last volume contains parts devoted to evidence in Equity, and Admiralty and Prize Courts. So far as the second volume discusses the rules of pleading and the application of evidence to the proof of the necessary allegations on certain issues, — as abatement, bastardy, carriers, case, custom, duress, insurance, libel, and the like, — the law may be contained in other books as well as in a book on evidence. The treatment of the variations in methods of proof, obtaining in Equity or Admiralty, may also be found in the appropriate treatises. Still, the suggestions of Mr. Greenleaf furnish a valuable summary to the student, and a ready book of reference to the practitioner.

These parts of Mr. Greenleaf's work are not relatively as valuable as when they were written, but we should not wish to see them grow obsolete, or to have the first volume of his work published separately.

In these volumes the same thorough course has been pursued, and very large additions in the way of cases and notes have been made by Mr. May.

*Commentaries on the Criminal Laws.* By JOEL PRENTISS BISHOP. Sixth edition. Revised and greatly enlarged. Two vols. Boston: Little, Brown & Co. 1877.

THESE volumes are a monument of conscientious and painstaking industry. They must have cost the devoted author an amount of labor in the presence of which a less warm and enthusiastic man would have retreated from the field. The work was good twenty years ago, and from the first has, under the author's watchful care and constant personal supervision, been growing better and better through six editions, till now, for the American lawyer certainly, it is, *longo intervallo*, the best treatise on its special subject to be found in the language. We speak from the test of actual, frequent, and long



continued use. A demand which has called for six editions in twenty years, settles any question as to the home estimate of the work; and we happen to know, aside from the evidence contained in the author's introduction, that Mr. Bishop's labors have attracted attention and are appreciated abroad. Indeed, we know of no single English work, which is so full and complete, and opens up so readily the learning of the books upon the qualities, characteristics, and definitions of common-law crimes. When Mr. Bishop began he found Chitty, Archbold, and Roscoe, or some annotated and fragmentary American reproductions of all three, occupying the field, — but no American treatise based on original methods, and personal examination of the original sources. This latter we now have as the result of Mr. Bishop's studies. Twenty-five hundred new cases examined and added to the more than seven thousand contained in the fifth edition, attest, at once, the amount of labor which has been bestowed, and the unflagging interest with which the author follows the ceaseless and swelling current of adjudications. That in all these multitudes of cases there may not be found some inaccuracy of statement, or some omission which we should not have advised; or that there are not peculiarities of style and of illustration at which a captious critic might carp, or to which even a candid one might object, we do not assert. But even such defects are neither many nor obvious, while every page bears testimony to the author's faithful endeavors to compass the great end — and a great one it is — of making a good book, both for the student and the practising lawyer. In presence of admitted and signal success, we do not sympathize with that criticism which waxes wroth on account of fancied or real infirmities of detail, and triumphs ostentatiously over the discovery of minor defects. We are more than content to accept the sun, maugre his spots. To a master-piece of art, in itself full of truth, life, and beauty, we can yield our homage, notwithstanding a prowling critic might discover a defective finger-nail. Such criticism is depraved; and will generally be found, we cannot but think, co-existent with an incapacity to fairly appreciate either merits or defects. The maker of a good book is a public benefactor, and no one who has not been in actual service can begin to tell what an expenditure of time and patience and thought it costs. We have a multitude of indifferent books, but no surfeit of good ones. We hope Mr. Bishop's success and example will lead others to give us the fruits of the same conscientious labor bestowed upon other fields.

*Practice, Pleading, and Evidence in the Courts of the State of California in General Civil Suits and Proceedings:* being the Code of Civil Procedure of California, as amended up to the close of the Twenty-first Session of the Legislature (1876), with full cross-references and annotations from the various Courts in the United States. By E. F. BUTTEMER HARSTON, of the San Francisco Bar. Adapted to all States that practise under a Code. San Francisco: A. L. Bancroft & Co., Law Book Publishers, Booksellers and Stationers. 1877.

THIS bulky volume is, in fact, the California Code of Civil Procedure, with its amendments and copious notes by Mr. Harston. The plan of the work is simple. The various sections of the Code are printed in their order, and to

such as require annotation are appended explanatory notes, in which are collected the various decisions of the California courts, which aid in the interpretation of the section or bear upon the subject of which it treats, and, in some instances, authorities from other States and countries upon which the Supreme Court of California has relied. It is difficult for any one who is not familiar with the law and practice of California to form an accurate judgment of the work, but it seems to have been well done. The notes, as far as we have been able to examine them, appear to be full, careful, and accurate. We cannot doubt that the book will be indispensable to all who have occasion to study or practise under the law of California. Such a manual, which presents at once the section of the statute and all the decisions which interpret or illustrate it, is a great convenience in every State, and in many the demand has been supplied. Mr. Harston's book compares favorably, in our judgment, with any similar work that has come to our notice.

Of the code itself we could say much, and the subject is inviting, but an essay on comparative jurisprudence cannot be compressed into the limits of a book notice.

*Forms and Use of Blanks.* By R. W. HENT, Counsellor at Law. Being over nine hundred forms in ordinary legal and business transactions, drawn strictly in conformity with the laws of California, Nevada, Colorado, Oregon, Washington, Montana, Idaho, Utah, Arizona, and Wyoming. Second edition. Greatly improved and condensed, with remarks and instructions relative to the using and filling up of the blanks, and the acknowledging and recording of the instruments of which forms are given. By J. C. BATES, of the San Francisco Bar. San Francisco: A. L. Bancroft & Co., Law Book Publishers, Booksellers and Stationers. 1877.

THE first edition of this work was published some ten years ago. The demand for a second proves that it has been found useful in the States and Territories for which it is designed. Its title-page states its contents fully, and the forms, as far as we have been able to examine them, seem neat and accurate.

- *Hubbell's Legal Directory for Lawyers and Business Men*, containing the names of one or more of the leading and most reliable attorneys in nearly three thousand cities and towns in the United States and Canada. A synopsis of the Collection Laws of each State and Canada, with instructions for taking depositions, the execution and acknowledgment of deeds, wills, &c., and a concise synopsis of the Bankrupt Law, with Registers in Bankruptcy and times for holding courts throughout the United States and Territories, for the year commencing October 1, 1876, to which is added a list of prominent banks and bankers throughout the United States. J. H. HUBBELL, Editor and Compiler. J. H. Hubbell & Co. New York: 24 Park Place.

THE value of this compilation is now well established, and it needs no recommendation to the profession. It fulfils the abundant promise of its title-page; and, in saying this, we say all that the title-page leaves unsaid.

*The Virginia Law Journal.* Vol. I. No. 1. January, 1877. GEORGE L. CHRISTIAN, FRANK W. CHRISTIAN, Editors. J. W. Randolph and English, Richmond, Va.

THIS new magazine is intended primarily, as we gather from the preface, to furnish the Virginia bar with reports of the decisions rendered by the courts of that State, some of which are now not reported at all, and others only in the regular reports at long intervals. It will contain also original articles on legal subjects. We have no doubt that it will prove a great convenience to the profession in Virginia, and we cordially wish it success.

## A LIST OF LAW BOOKS PUBLISHED IN ENGLAND AND AMERICA SINCE JANUARY, 1877.

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- American Railway Reports.** Vol. 8. (Shipman.) 8vo, sheep, \$6.00. Cockcroft & Co., New York.
- American Reports.** Edited by Isaac Grant Thompson. Vol. 19. 8vo, sheep, \$6.00. John D. Parsons, Jr., Albany.
- Archbold, J. F.** The Statutes relating to Lunacy, Pauper Lunatics, &c. Second edition. 8vo, cloth, 21s. Shaw & Sons, London.
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- Benning, H. T.** Concise Treatise on the Statute Law of the Limitation of Actions. 8vo, cloth, 16s. Stevens & Haynes, London.
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## SUMMARY OF EVENTS.

## THE UNITED STATES.

THE ELECTORAL COMMISSION. — When Congress met last December, the two Houses were called upon to deal with the most difficult problem which could be presented under the Constitution, and to solve it under circumstances the most unfavorable for calm and impartial deliberation. The questions raised by the double returns from the contested States were in themselves most embarrassing, and the difficulty was increased by the doubt as to where lay the power to decide them. Could the President of the Senate determine what votes should be counted? or, was this power granted to Congress, and, if so, did it require the concurrence of both Houses to reject a vote, or must both agree to count it? The answers to these questions decided the election. They had been the subject of earnest discussion for many years, and opinions had been very evenly balanced. It was natural that each party should adopt the view which would insure a decision in its favor; it was clear that neither would yield; it was impossible that a conflict which long debates had left undecided, when no personal interest was affected by the result, should be ended in less than three months, when the interests at stake were so vast, when both parties were exasperated by the alleged frauds of their opponents, and when individual interests and ambitions were certain to enter so largely into the contest. Under these circumstances, it was obviously vain to expect that the two Houses could unite on any settlement of the vexed questions; and no course was left but the creation of an independent tribunal, which should first determine the power of Congress over the electoral votes, and then, exercising that power, should further decide what votes should be counted. Such a tribunal was the Electoral Commission.

It is yet too early to determine the precise value of the contribution made by the decisions of this tribunal toward the settlement of the questions in dispute, as the opinions of its members will not be published until after the thirty-first of March. We have now only a brief statement of the results arrived at. The decision in the first case sent to the Commission, that of Florida, brought the dispute within the narrowest limits. This decision, which was afterward followed in the Louisiana case, was, "That it is not competent under the Constitution and the law as it existed at the date of the constituent act, to go into evidence *aliunde* the papers opened by the President of the Senate in the presence of the two Houses, to prove that other persons than those regularly certified to by the governor of the State of Florida, in and according to the determination and declaration of their appointment by the board of State canvassers of said State prior to the time required for the performance of their duties, had been appointed electors, or by counter proof to show that they had not."

It was also decided in the Florida case, that "all proceedings of the courts or acts of the legislature or of the executive of Florida, subsequent to the casting of the votes of the electors on the prescribed day," were inadmissible in evidence. This decision would seem to be within the policy of the law which requires that the election shall be held on the same day throughout the Union; namely, that no State may have the power to change the general result, simply by delaying the declaration of its own vote, or by voting on a later day with knowledge of the results elsewhere.

In both Florida and Louisiana, questions arose in regard to the eligibility of electors; but there seems to be a genuine contradiction between the rulings of the Commission in the two cases, which we must wait for the opinions to reconcile. In the case of Florida, it was voted to receive evidence touching the eligibility of Humphries, whose title was disputed; but the Commission found as a fact that the evidence was not sufficient to show that he held the disqualifying office on the day he was chosen. In the Louisiana case, however, the Commission laid down the rule, that "it is not competent to prove that any of said persons so appointed electors as aforesaid held an office of trust or profit under the United States at the time when they were appointed, or that they were ineligible under the laws of the State, or any other matter offered to be proved *aliunde* said certificates and papers."

In the Oregon case, on the other hand, the Commission seem to turn again to their ruling in the Florida case. They say: "That, although the evidence shows that Watts was a postmaster at the time of his election, that fact is rendered immaterial by his resignation both as postmaster and elector, and his subsequent appointment to fill the vacancy so made by the electoral commission," meaning the other two electors.

The questions whether Congress, or the Commission holding its powers, could go behind the certificates of the States, and examine into the eligibility of electors, were of course the only questions of general importance, though naturally a number of other points were raised the determination of which was material to the settlement of this particular election. Upon these general questions, the decisions of the Commission can hardly reconcile the conflicting opinions. The nearly equal division among its members makes only more apparent the radical difference between the opposing views, and will always greatly affect the authority of the Commission's decrees.

We may, however, at least consider it settled, that the President of the Senate has no power to determine what votes shall be counted. The debate on the bill creating the Electoral Commission developed such a weight of authority against this claim, that it will hardly again be advanced.

It is also apparent that most of the questions which the Commission was called upon to decide grew out of the system of electors, and would disappear if that system were abandoned. Electors have long since ceased to be such in reality; and we may well consider what we gain by retaining a cumbersome piece of constitutional machinery which has so clearly survived its usefulness. It is probable that the first step toward preventing a recurrence of these troubles will be the abolition of the Electoral College.

While, however, we are satisfied that the Electoral Commission has decided no disputed question of constitutional law, so that it will not be raised again



as soon as occasion offers; and that the contest over this election has settled nothing, except that we should at once amend the Constitution so as to make such another contest impossible, — we may, at least, feel proud of having proved that a republican form of government is strong enough to resist dangers which have proved fatal to every other system. The creation of the Electoral Commission, and the quiet acquiescence of the defeated party in a result reached by what many consider a triumph of law over justice, and which to many of them is a bitter personal disappointment, are events to which history shows no parallel. It has well been said that the function of the American people is "to improvise government."

In the light of our recent experience, the following passage reads strangely: "The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from opponents. The most plausible of these who has appeared in print has even deigned to admit, that the election of the President is pretty well guarded. I venture somewhat further, and hesitate not to affirm, that if the manner of it be not perfect, it is at least excellent." So writes Hamilton in the *Federalist*; and his words afford fresh evidence, if evidence is needed, that there are contingencies which our ancestors did not foresee, and for which therefore, the Constitution which they framed makes no provision. It is the part of wisdom frankly to admit this, and by amendment to remedy the defects in that instrument as they are discovered, rather than by strained constructions to make it bear an interpretation which was never intended. Our safety lies in strict construction and liberal amendment.

**GRANGER CASES. SUPREME COURT.** — On the first of March, after a consideration of something over a year, the Supreme Court rendered its decisions in the series of Granger cases, so called. In the line of decisions which define the power of the States, these are among the most important that have ever been made. The opinions were delivered by WAITE, C. J. In the principal case, *Munn et al v. State of Illinois*, the question was whether the State could "fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved." Among other grounds of objection it was urged, that such a law was repugnant "to that part of Amendment XIV. which ordains that no State shall 'deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'"

After saying that governments have had from the earliest times an undoubted right to establish laws "requiring each citizen so to conduct himself and so use his own property as not unnecessarily to injure another;" and under this right to regulate "the conduct of its citizens toward one another, and the manner in which each shall use his property when such regulation becomes necessary for the public good," the court says: —

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale, more than two hundred years ago, in his Treatise *De Portibus Maris* (1 Harg. Law Tracts, 78), and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

After citing numerous cases, as of ferries, wharves, warehouses, &c., in which the right to make such regulations has heretofore been recognized, the opinion proceeds:—

"It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

"For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that 'the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard, by the great lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored; and these have been found in grain warehouses, which are commonly called *elevators*, because the grain is *elevated* from the boat or car by machinery, operated by steam, into the bins prepared for its reception; and *elevated* from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the largest traffic between the citizens of the country north and west of Chicago, and the citizens of the country lying on the Atlantic coast north of Washington, is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the seashore, and forms the largest part of the inter-state commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other, and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate; and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the

transaction of such business by the carrier. The ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit. . . .

"Under such circumstances, it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment, and exercises 'a sort of public office,' these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very 'gateway of commerce,' and take toll from all who pass. Their business most certainly 'tends to a common charge, and is become a thing of public interest and use.' Every bushel of grain for its passage 'pays a toll, which is a common charge,' and, therefore, according to Lord Hale, every such warehouseman 'ought to be under public regulation, viz., that he . . . take but reasonable toll.' Certainly, if any business can be clothed 'with a public interest and cease to be *juris privati* only,' this has been. It may not be made so by the operation of the Constitution of Illinois or this statute; but it is by the facts."

In answer to the argument that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question, the court says:—

"As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule which requires the charge to be reasonable is itself a regulation as to price. Without it, the owner could make his rates at will, and compel the public to yield to his terms, or forego the use."

*Chicago, Burlington, & Quincy R.R. Co. v. Cutts et als.* In this case the court holds that, in the absence of any restriction on the matter in the charter of the company, the legislature may establish a maximum rate of charge for carriage. The court says:—

"It is a matter of no importance that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by non-user. . . .

"Neither does it affect the case that, before the power was exercised, the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. After the pledge and after the lease, the property remained within the jurisdiction of the State, and continued subject to the same governmental powers that existed before."

We regret that we can only make this brief mention of these very important decisions.

**EXTRADITION WITH SPAIN.** — The President has announced the ratification of an extradition treaty with Spain. The treaty was signed at Madrid on Jan. 5. The discussions that arose out of our difficulty with England in the Winslow matter, have obviously done much in shaping the treaty with Spain, which, it seems not unlikely, will form a basis for any others we may negotiate. It is agreed that the governments of the United States and of Spain shall, upon mutual requisition duly made, deliver up to justice all persons who may be charged with, or who have been convicted of, any crime specified in the convention, committed within the jurisdiction of one of the contracting parties, while said persons were actually within such jurisdiction when the crime was committed, and who shall seek an asylum or be found within the territories of the other: provided such surrender shall take place only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had been there committed.

The treaty then proceeds: —

“Article 2. Persons shall be delivered up, according to the provisions of this convention, who shall have been charged with or convicted of any of the following crimes: —

“First, Murder, comprehending the crimes designated by the terms parricide, assassination, poisoning, or infanticide; second, attempt to commit murder; third, rape; fourth, arson; fifth, piracy or mutiny on board, when the crew or other person on board, or part thereof, have, by fraud or violence against the commander, taken possession of a vessel; sixth, burglary, defined to be an act of breaking or entering into a house of another in the night-time, with intent to commit felony therein; seventh, the act of breaking and entering offices of the government and public authorities, or offices of banks, banking-houses, savings banks, trust companies, and insurance companies, with intent to commit felony therein; eighth, robbery, defined to be felonious and forcible, taking from the person of another goods or money by violence, or by putting him in fear; ninth, forgery or the utterance of forged papers; tenth, forgery or falsification of the official acts of the government or public authority, including courts of justice, or the uttering or fraudulent use of any of the same; eleventh, fabrication of counterfeit money, whether coin or paper, counterfeit letter or coupons of public debt, bank-notes or other instruments of public credit, of counterfeit seals, stamps, dies, or marks of State or public administrator, and the utterance, circulation, or fraudulent use of any of the above-mentioned objects; twelfth, embezzlement of public funds committed within the jurisdiction of one or the other party by public officers or depositaries; thirteenth, embezzlement by any person or persons, hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment; fourteenth, kidnapping, defined to be detention of person or persons, in order to exact money from them, or for any other unlawful end.

“Article 3. The provisions of this convention shall not import the claim of extradition for any crime or offence of political character, nor for acts connected with such crimes or offences; and no person surrendered by either contracting party in virtue of this convention shall be tried or punished for any political crime or offence, nor for any act connected therewith committed previously to extradition.

“Article 4. No person shall be subject to extradition for any crime or offence committed previous to the exchange of ratifications hereof, and no person be tried

for any crime or offence other than that for which he was surrendered, unless such crime be one of those enumerated in Article 2, and shall have been committed subsequent to the exchange of ratifications hereof.

"Article 5. A fugitive criminal shall not be surrendered under the provisions hereof, when, from a lapse of time or other lawful cause, according to the laws of the place within the jurisdiction of which the crime was committed, the criminal is exempt from prosecution or punishment for the offence for which his surrender is asked.

"Article 6. If a fugitive criminal, whose surrender may be claimed pursuant to the stipulations hereof, be actually under prosecution, out on bail or in custody for crime or offence committed in the country where he has been convicted thereof, his extradition may be deferred until such proceedings be determined, and until such criminal has been set at liberty in due course of law.

"Article 7. If the fugitive claimed by one of the parties hereof shall be also claimed by one or more powers, pursuant to the treaty provisions, on account of crimes committed within their jurisdiction, the criminal shall be delivered in their presence, in accordance with the demand which is the earliest in date.

"Article 8. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."

The remaining articles are briefly as follows: "9. Expenses to be paid by the government demanding a criminal. 10. Proofs of guilt shall be surrendered when found with a criminal. 11. The convention shall be applicable to all foreign or colonial possessions of either of the two contracting parties. Representatives or superior consular officers are to ask warrant of arrest for the person whose surrender is sought; whereupon the judges and magistrates of the two governments shall have power to issue a warrant for the apprehension of the person charged; if the fugitive criminal shall have been convicted of the crime for which his surrender is asked, a copy of the sentence shall be produced. 12. This convention shall continue in force from Feb. 21; but either party may at any time terminate the same on giving to the other six months' notice of its intention so to do.

**EXTRADITION WITH ENGLAND.** — There seems to have been some misunderstanding as to what was exactly the position of the British government in withdrawing the objections made by it in the matter of Winslow's extradition. Their own view of it was recently stated in the House of Lords by Lord Derby, who said: —

"The extradition of a man named Lawrence was demanded by the American government on a charge made against him. His extradition was granted on that charge, and he was put on his trial in the United States. While he was about to be put on his trial, a representation was made to us that steps were being taken by the United States government to put him on trial for another offence in the event of failure to obtain a conviction on the charge in respect of which the extradition had been granted. Now, as the man had not been surrendered on that second charge, that raised the question as to the construction to be placed on the treaty. We objected to the proceeding said to be contemplated by the United States government, and that government did not at the time deny the intention to put Lawrence on his trial in respect of the second charge; but they urged views in reference to the construction of the treaty which led to the correspondence between the two govern-

ments, which your lordships will recollect, and which led to a discussion in this House. The result was that we and the government of the United States held opposite views as to the construction of the treaty, inasmuch as they claimed a right which we held they were not entitled to claim; and we felt bound to refuse to grant any further extraditions till the question should be settled, and so matters remained for some time. Meanwhile, the man Lawrence was tried for the offence on which his extradition had been granted. I am not aware what became of him; but at all events there was no second trial. However, in the month of August last we received through the American Minister a communication from the United States government which, if it had been made before, would have saved a great deal of trouble. From this communication it appeared that, notwithstanding the representations which had been made on the subject, yet, as far as the United States government were concerned, no steps had been taken, or had been intended to be taken, with the view of putting Lawrence on his trial for the second offence. In other words, the government of the United States claimed a right under the treaty which we did not admit the existence of; but they stated, and we did not doubt the accuracy of the statement, that they had not exercised, or attempted to exercise, the right they so claimed. That materially altered the position of affairs. We continued to maintain, and we maintain now, that the construction which we put on the treaty was the correct one; but from the information we obtained in August, and which, I repeat, it is a pity we had not obtained at an earlier date, it appeared that the question raised by the United States government was purely theoretical: that is, they having raised a point which had not arisen in practice, we thought that the question might well remain in abeyance till it did arise in actual practice. We were of opinion that, in the circumstances really existing, there was no further occasion for suspending the operation of the treaty, and it remains now as it was before. Had steps been taken under it by the United States government inconsistent with the view held by us, then we should have continued to feel that the treaty could only be renewed under the conditions suggested by us; but, as matters stood, we felt that those conditions were no longer required. The arrangements between the two governments continue as before that question was raised, pending the negotiations for a new treaty, which negotiations are now in progress. That is the whole case."

Mr. JUSTICE DAVIS of the Supreme Court was elected by the General Assembly of Illinois as the successor of General Logan in the United States Senate, on January 25, 1877.

The nomination of Mr. JUSTICE DEVENS, of the Supreme Court of Massachusetts, as Attorney-General of the United States, was sent to the Senate March 7, and confirmed by that body on the 10th day of March.

## ILLINOIS.

COMMON CARRIER. — LIABILITY FOR ACTS OF "STRIKERS." — *Pittsburg, Ft. Wayne, & Chicago Ry. Co. v. Hazen*. — SUPREME COURT. — A question of considerable interest and some nicety arose in this case. The facts are sufficiently stated in the opinion of the court. The judgment below was for Hazen. On appeal to the Supreme Court, the matter was twice argued, and that court finally delivered the following opinion (DICKEY, J.): —

"On the 10th of December, 1870, Hazen shipped, by the freight line of the railway company, a quantity of cheese from Chicago to New York. The cheese was

delivered to the consignee at New York on the 28th of December, eighteen days after the shipment: the proofs tending to show that the usual period of such transit, at that time, did not exceed twelve days; that the weather from the 10th to the 23d was not severely cold; but that severe cold occurred between the 23d and 28th; and that the cheese when delivered in New York was frozen, and thereby damaged to the amount of \$1,100.55; and for this amount was the verdict and judgment in favor of Hazen, from which the railway company appeal.

"As an excuse for this delay beyond the usual period of such transit, the defendant, at the trial below, sought to prove that the sole cause of the delay was the obstruction of the passage of trains in the neighborhood of Leavitsburg, resulting from the irresistible violence of a large number of lawless men, acting in combination with brakemen, who up to that time had been employed by the railway company; that the brakemen refused to work, and were discharged, and other brakemen promptly employed; but the moving of trains was prevented by the threats and violence of a mob. This evidence was objected to by the plaintiff, and excluded by the court. This, we think, was error. It is doubtless the law that railway companies cannot claim immunity from damages for injuries resulting in such cases from the misconduct of their employés, whether such misconduct be wilful or merely negligent. If employés of a common carrier suddenly refuse to work, and the carrier fails promptly to supply their places with other employés, and injury results from the delay, the carrier is responsible: such delay results from the fault of the employés. The evidence offered in this case, however, tends to prove that the delay was not the result of a want of suitable employés to conduct the trains; for the places of the "strikers" were (according to the proof offered) promptly supplied by others. The proof offered tends to show that the delay was caused by the lawless and irresistible violence of the discharged brakemen, and others acting in combination with them. These men, at the time of this lawlessness, were no longer the employés of the company. The case supposed is not distinguishable, in principle, from the assault of a mob of strangers. All the testimony on this subject should have been submitted to the jury for their determination of the question, whether, under all the circumstances, the period of transit was unnecessarily long.

"For the delay resulting from the refusal of the employés of the company to do duty, the company is undoubtedly responsible; for delay resulting solely from the lawless violence of men, not in the employment of the company, the company is not responsible, even though the men whose violence caused the delay had but a short time before been employed by the company.

"Where employés suddenly refuse to work, and are discharged, and delay results from the failure of the carrier to supply promptly their places, such delay is attributable to the misconduct of the employés in refusing to do their duty, and the misconduct in such case is justly considered the proximate cause of the delay; but when the places of the recusant employés are promptly supplied by others, competent men, and the "strikers" then prevent the new employés from doing duty, by lawless and irresistible violence, the delay resulting solely from this cause is not attributable to the misconduct of employés, but arises from the misconduct of persons for whose acts the carrier is in no manner responsible.

"The judgment is therefore reversed, and the cause remanded for a new trial."

#### IOWA.

BANKRUPTCY. — JURISDICTION OF STATE COURT. — U. S. CIRCUIT COURT.  
— To fix the precise limit of the jurisdiction of the State courts in causes

wherein the defendant becomes bankrupt, still seems difficult. In *Bracken, Assignee of Browne v. Johnston*, the defendant, Sept. 23, 1872, brought his suit in the State court against Browne, and attached his property. Jan. 21, 1878, Browne's creditors filed a petition in bankruptcy against him; and, February 14 he was adjudged bankrupt. On the 18th February, the bankrupt appeared in the State court, answered the defendant's suit, went to trial, and defendant Johnston had judgment. The property attached was seized on the execution, and sold March 22. The same day the plaintiff here was duly elected assignee of Browne, and, after demand and refusal, brought this action to recover the value of the goods taken on execution. On the question whether a party proceeding by writ of attachment, and seizing the goods of his debtor, and realizing by judgment and sale under execution the whole or part of his debt, is liable to an assignee in bankruptcy of the debtor appointed under proceedings instituted in the bankruptcy court, within four months of the levy of attachment, though no appearance or defence was made by the assignee in the attachment proceeding, nor any attempt to arrest them, the court (MILLER, J.) says: —

"The question occupies debatable ground in which two important principles of the bankrupt law seem to come in conflict; namely, the principle that no person shall by writ of attachment against the bankrupt obtain a preference for his debt over other creditors, unless issued more than four months before the commencement of the bankruptcy proceedings, and the principle that the State courts are not divested of their jurisdiction of cases pending in them, by the initiation of bankruptcy proceedings against one of the parties to such a suit, unless it be brought to the notice of the State court by some appropriate proceeding in that case. . . .

"If there can be found any middle ground by which both these principles can be left to their just and proper operation, we ought to adopt it in the solution of this case. I think there is such a ground. The two opinions of the Supreme Court, in which the authority of the State courts has been most firmly sustained, were probably delivered by myself. I mean the case of *Wilson v. The City Bank*, 17 Wall. 478, and the case of *Eyster v. Gaff et al.*, 91 U. S. (1 Otto) 521.

"But in both these cases, the proceedings of the court which were upheld were the exercise of the regular and ordinary powers of the court in rendering a judgment or decree against the party before it. And I still adhere to the doctrine, that if, by the usual process of the court, a plaintiff secures a judgment against the bankrupt, which judgment is of itself a lien, or by virtue of the levy of an execution becomes a lien, before the commencement of the bankruptcy proceedings, that lien must prevail; or when the State court, in pursuance of a jurisdiction invoked before the bankruptcy proceedings commenced, enforces a lien which has by the bankrupt law itself a priority over other creditors, as a mortgage or other specific lien, its proceedings are valid and effectual, notwithstanding the commencement of proceedings in bankruptcy while they are pending. But there is a very marked difference in the favor with which such a lien should be regarded, and a lien obtained by the extraordinary and summary proceeding of attachment, in which the plaintiff, being made aware of the failing condition of his debtor, takes the remedy into his own hands, and by an *ex parte* proceeding appropriates by his own volition the debtor's property to the exclusive payment of his own debt. And it was precisely this proceeding which the provision I have cited from the Bankrupt Law, viz., § 5044 of the Revised Statutes, was intended to prevent, by declaring that all such attachments are dis-



solved by the assignment of the bankrupt's property, unless made within four months next preceding the commencement of the bankrupt proceedings.

"The purpose of the act was to put a creditor, who undertook to secure a lien by attachment, in precisely the same condition as one who took a preference or lien by the consent of the debtor. In both cases the creditor proceeded at his own hazard. If the debtor escaped the bankruptcy court for the prescribed time, the preference or lien remained valid. If he did not, it is void absolutely. The language of the section I have cited is very strong in this direction, if, to repel the idea that the attachment is merely voidable, it is declared that the making of the deed to the assignee shall by operation of law vest title to property in the assignee, and dissolve any attachment made within the four months. I think this was intended to mean that, in the contingency mentioned, the attachment was *ipso facto* dissolved, and the property attached became freed from the effects of the suit, and that it required no judicial proceeding to restore it to that condition.

"This view of the matter does not divest the court in which the attachment suit is pending of its jurisdiction over the case and the parties. It merely declares that the title to the attached property having been vested, by written judicial proceeding, in the assignee, the lien of the attachment is at an end.

"The court can proceed to judgment against the party, and issue its execution. If property liable to it can be found, it can be enforced. If not, it is like the judgment in any other case against a debtor without means. And there is no hardship in this, for the reason that the attaching creditor was informed by the provisions of the bankrupt law that he initiated his attachment proceeding subject to its being rendered ineffectual by proceedings in bankruptcy within four months. This view, I think, reconciles the two opposing principles. It leaves the general jurisdiction of this State court, or any other court in which the attachment suit is pending, unaffected; and it can proceed as if no bankruptcy proceeding had been commenced, and its judgment is valid in every other respect, except that the lien on the property is gone. It gives full effect to the purpose of the bankrupt law, that no such attachment shall prevail, when instituted within four months before that law is called into operation, and in subordination to which principle the attaching creditor instituted his proceedings. The present case very forcibly illustrates the necessity of adopting this rule, if full effect is to be given to the provision of the bankrupt law; for the finding of facts shows that, though the bankrupt proceedings were instituted within four months after the levy of the attachment, the assignee was *not* appointed until the very day the property was sold under Johnston's execution. It was, therefore, impossible that the assignee could have interposed at any stage of the proceeding in the State court to bring to its notice the bankrupt proceedings, or to procure an order dissolving the attachment; and the creditors whom he represents were without remedy, notwithstanding the positive declaration of the bankrupt law. I am of opinion that the defendant, Johnston, was liable for the value of the goods, as evidenced by the sum for which they sold."

## KANSAS.

**BANKRUPTCY. — PROCEEDINGS IN INVITUM. — NUMBER OF CREDITORS.**  
— U. S. CIRCUIT COURT. — The *Central Law Journal* prints an opinion of DILLON, J., regarding the question whether attaching creditors, whose attachments have been made within four months before the commencement of proceedings, shall be reckoned in computing the proportion of creditors, in

number and amount, who must join in a petition *in invitum*. The facts appear in the opinion. The judge rendered an oral decision, saying:—

“ This case is before me on a petition to review the action of the district court, and the facts are as follows : Isaac T. Hosea filed his petition for adjudication of bankruptcy against Charles G. Scrafford, alleging, among other things, that he constituted one-fourth in number of the creditors, and that his claim was one-third in amount of the indebtedness of the alleged bankrupt. This was denied by Scrafford, who appeared by attorney and filed a list of his creditors, with a statement of his indebtedness. Certain other creditors then appeared, alleging that they had levied attachments on the debtor's property, within four months before the commencement of the proceedings, and asked leave to oppose the adjudication. This leave was granted them, and the court proceeded to inquire into the number of creditors and the amounts of their respective claims ; whereupon, it was moved on part of the petitioning creditors, that all persons who held such attachments be excluded from the count as to the number of creditors and amount of indebtedness necessary to be joined in the petition. This motion was overruled by the District Court ; and, notice being given of the proposed filing of a petition for review, the case was stayed at this point, and no further proceedings have since been had.

“ The object of the Bankrupt Law is to secure an equal distribution of the estate of the bankrupt amongst all of his creditors ; and, in order the most effectually to accomplish this, creditors who have obtained preferences are excluded from participation in the proceedings until after the election of an assignee. I can see no reason why attaching creditors should not be governed by the same rules which apply to other creditors, whose debts are secured by preferences, which the adjudication will defeat. Indeed, as all attachments levied within four months before the commencement of the filing of the petition would be dissolved *ipso facto* by the operation of the bankruptcy proceedings, persons holding liens by such attachments would seem to have a peculiar interest in defeating an adjudication, and for this reason should not be reckoned, for the purposes of those proceedings, as creditors of the alleged bankrupt. Of course, they could not be counted if the attachments were sued out with a view of obtaining a preference over other creditors ; and, as in most cases a ground of attachment is also an act of bankruptcy, the presumption would be strong that such was the object of an attaching creditor. A person with a knowledge that his debtor has committed an act of bankruptcy should not be permitted to obtain by attachment and hold a preference over other creditors. I do not think that creditors, any more than the debtor, should be permitted so to defeat the object of the Bankrupt Law. A secured creditor cannot vote for assignee, nor can he have his debtor adjudged a bankrupt. If he cannot be counted in favor of the proceedings to put the debtor into bankruptcy, because he is secured, there is no principle upon which he could be counted against them.

“ My conclusion therefore is, that when a creditor of an alleged bankrupt, either by an arrangement with the bankrupt, or by attachment, obtained a security or lien for his claim in fraud of the Bankrupt Act, or which would be avoided by that act if the debtor is adjudged a bankrupt, he cannot be counted, nor can his claim be estimated, in computing the number and value necessary to be joined in the petition.”

#### MAINE.

CORPORATION.—CONSTRUCTION OF CHARTER.—A question of interest has recently been decided by the Supreme Court in the *The State v. The Maine Central Railroad Co.* The defendant corporation has, as the result of two

consolidations, been formed out of what were originally five several railroad companies. Some of these five companies had been by their charters exempt, in whole or in part, from taxation; such exemption depending upon certain acts to be performed by them. And, in the case of two of these companies, the mortgage bondholders had foreclosed their mortgages and formed new corporations before the consolidation. By the act of consolidation the new corporation was to have all the "immunities" of each of the corporations which went to compose it.

In an action brought to recover a tax duly assessed upon the corporate franchise of the defendants, the validity of the tax was denied, on the ground that the immunity granted to certain of the original companies was extended by the act of consolidation to these defendants. The court (APPLETON, C. J.) say:—

"A new corporation may as well be created by the union, under a new organization, of existent and distinct organizations as of individuals. The new corporation is equally distinct from its component parts, whether composed of corporations or individuals. The old corporations are dissolved, except so far as they may be permitted to exist for the purpose of protecting creditors or mortgagees. The corporate rights of the new corporation are those derived from its charter — the act of consolidation — under and by virtue of which alone it began to be and is."

It appearing that the acts of consolidation did not in terms grant the exemption claimed, it only remained to consider whether the defendants could claim it on the ground that the corporation was entitled to the "immunities" of each of the component corporations. And the court held that they could not. The court's conclusions are thus summed up in the opinion:—

"When a new corporation is formed out of two or more previously existing corporations, and by the act creating it is 'to have the powers, privileges, and immunities possessed by each of the corporations whose union constitutes such new corporation, the new corporation will have 'privileges, powers, and immunities which they all (i. e. every one of them all) had, and it will not have those special powers, privileges, and immunities which some had and some did not have.

"That, when two or more corporations with a special immunity from general taxation, the amount of such taxation being dependent upon certain precedent acts to be done by such corporation, thus to be exempted and those corporations are incorporated into a new corporation, which is unable and is not required to do or perform the acts, which must precede such special taxation, the new corporation thus created cannot claim the special immunity belonging to the corporations out of which it is composed.

"That, corporations formed by the action of the mortgagees of insolvent corporations and those formed by the consolidation of pre-existing corporations are *new* corporations, both by the rules of the common law and by the express terms of the statutes under and from which they derive their corporate existence — that, as such new corporation they are subject to the general law of 1881, c. 503, which has been continued in force to the present time — and consequently they are liable to taxation.

"As no exemption was granted in specific terms, the remark of Mr. Justice Clifford in *Holyoke v. Lyman*, 15 Wall, 500, is peculiarly applicable, — that 'what is not granted in such acts is taken to be withheld.'"

In *Morgan, plaintiff in error, v. State of Louisiana*, decided by the Supreme Court of the United States, at the October Term, 1876, it was *held*, that im-

munity from taxation was not itself "a franchise of a railroad corporation, which would pass as such, without other description, to a purchaser of its property; and that upon a sale of the property and franchises of a railroad corporation under a decree founded upon a mortgage, which in its terms covers the franchises, immunity from taxation, provided in the act of incorporation, did not accompany the property in its transfer to the purchaser."

HON. ETHER SHEPLEY, ex-Chief Justice of the Supreme Court of Maine, died Jan. 15, at the advanced age of eighty-seven years. Judge Shepley was born in Massachusetts, where he received his early education, but was graduated at Dartmouth College. On his admission to the bar, he established himself at Saco. He took a prominent part, in 1819, in the question of the separation of Maine from Massachusetts; and soon after the separation he was appointed District Attorney of the United States for the Maine District. In 1836, he was appointed to the Supreme Bench, where he sat till 1855, — after 1848, as Chief Justice. He also served in the United States Senate from 1833 to 1836.

#### MASSACHUSETTS.

THE HON. EMORY WASHBURN. — The life of this eminent citizen, lawyer, teacher, and writer was ended suddenly and peacefully at his residence, in Cambridge, on Sunday, March 18, 1877. He had been confined to his house by an attack of acute pneumonia for four weeks; and was apparently recovering, when a clot of blood in the artery leading to the lungs proved almost instantly fatal. He was seventy-seven years old, and through the whole of this long life preserved a remarkable vitality, with a capacity and love of labor rarely equalled. Scarcely was his eye dim, or his natural force abated, when his work on earth ceased.

He was a native of Leicester, Massachusetts; a graduate of Williams College, from which, as well as Harvard, he received the degree of Doctor of Laws; and commenced his career as a lawyer fifty-six years ago. He has been a member of both branches of the Legislature; a Judge of the Court of Common Pleas; for a short time, the manager of one of the largest manufacturing corporations in the State; Governor of the Commonwealth; and, for the last twenty years, Bussey Professor of Law in Harvard University. He was the author of the very complete and valuable "Treatise on the American Law of Easements and Servitudes," in one volume; and of the learned and able "Treatise on the American Law of Real Property," in three volumes. His interest in historical and antiquarian studies was frequently manifested in the preparation of occasional addresses and essays. He was a Vice-president of the Massachusetts Historical Society; and, during the winter preceding his death, a representative of Cambridge in the Legislature, and Chairman of the Judiciary Committee of the House of Representatives. He was one of the earliest and most intelligent promoters of our railroad system; and, for the greater part of his active life, a railroad director. He was a member of numerous charitable organizations, a firm supporter of religious institutions, a zealous friend of popular education, and ready to do his part and more of all social duties.

He had an even and sunny temper; and, with decided opinions, no animosities. It was striking to notice how often those with whom he differed most would turn to him when in want of help, with a confidence that was never disappointed. His hospitalities were very wide; and embraced not only his large circle of friends, and strangers who had claims upon his attention, but also the humble, the awkward, and the friendless. He was the friendliest of men; he took an interest in every thing that concerned human welfare; he loved to make other people happy; and was always ready with counsel and assistance for all who needed it. His sympathies were inexhaustible, and he carried into old age the freshness and energy of youth.

His industry was incessant and untiring; he thoroughly believed in his clients, and made their feelings and interests his own; he was the personal friend of every pupil in his office, and of every student in his classes; was honorable, patriotic, and humane. He did his best in every thing he undertook, and was as unpretending as he was upright. Every faculty and capacity that was given him was diligently and conscientiously employed. He was beloved in his home; honored and trusted by his neighbors and fellow-citizens; he amply discharged the debt due to his profession; and at the close of his laborious, useful, prosperous, and happy life, has been followed to the grave with a tribute of respect, affection, and gratitude as sincere and universal as falls to the lot of man.

INTER-STATE EXTRADITION. — SUPREME COURT. — *Joseph C. Davis, petitioner, for habeas corpus.* — The petitioner had been indicted in Vermont for obtaining money by false pretences, and was arrested on a warrant issued by the Governor of Massachusetts, upon a requisition from the Governor of the former State. He claimed his discharge on the ground that the indictment upon which the proceedings were founded was defective, in that it charged no offence against the laws of Vermont. His claim was resisted on the ground that the question whether the indictment was sufficient could not be raised.

It was urged in behalf of the petitioner that the court was not precluded by the Governor's warrant from inquiring whether the case was within the law; that, in *Lawrence v. Brady*, 56 N. Y. 182, the court held that, "It is a condition precedent to a surrender upon requisition that the executive of the State upon whom the demand is made, be formally apprised of the facts upon which the duty depends; and the court has jurisdiction to interfere by *habeas corpus*, and to examine into the grounds upon which the executive warrant is issued; and, in case the papers are informal or insufficient, the prisoner will be discharged." And that in 7 Blatch., in the case of *In re Farey*, it was held that, "it is not enough in a complaint praying the issue of a warrant in an extradition case, to charge a crime generally; but the offence should be clearly set forth, so that the court can see that a crime, for which extradition can take place, has been committed."

The court ordered that the prisoner be remanded to the custody of the officer arresting him, for the reason that "the indictment substantially charges a crime against the laws of Vermont, and its technical sufficiency must be determined by the courts of the State in which it was found, and not by this court upon *habeas corpus*."

**SALVAGE. — DERELICT. — U. S. DISTRICT COURT. — *One Anchor and Chain.*** — This was a libel for salvage. The facts were these. The steamship *Palestine*, in cruising to anchor inside of Boston Light, at night, on Saturday, January 6, 1876, lost her anchor and chain. On the following Monday, Francis H. Cleverly, one of the libellants, master of the wrecking schooner *Plover*, who joined his crew with him in the proceedings, applied to the pilot who had brought in the steamship, to give him the range of the place where the anchor and chain were lost. The pilot replied that he supposed that the agents of the ship, Warren & Co., of Boston, were negotiating for the recovery of the property; and, if Captain Cleverly would bring an order from them, he would give him the information. Without seeing the agents, Captain Cleverly went down with his vessel to the place he supposed to be that of the loss, and succeeded in finding the end of the cable. While he was trying to raise the anchor, which was very heavy and was fast in the clay, a wrecker came down who had been engaged by the agents of the ship upon the terms that he should have \$25 if unsuccessful, and \$50 if he brought up the anchor and chain. This wrecker had a steam winch, and offered the libellant, who was not provided with such an apparatus, to let him have the use of it; he also offered to buy out the libellant. Both offers were rejected, and this wrecker went back to Boston. The libellant found that he could not raise the anchor, and went to town and hired a wrecker who had the necessary means, and who had been an unsuccessful bidder for the contract, to come and recover the anchor, which he did. The claimants tendered the libellants \$50, which was refused.

In delivering his opinion, LOWELL, J., said: —

“There seems to be an unwritten law in the harbor of Boston, that whoever first obtains possession of a lost anchor holds it against all the world, until the salvage is paid. Such a usage cannot stand the examination of the courts. This anchor and chain were not derelict in any proper sense. Their owners were known to the libellant, and it was known that they had the hope and reasonable expectation of recovering it. The libellant might have been a bidder for the contract; but he has no right to make his bid with one end of the cable in his possession. When the contractor came down and was prepared to offer him \$25, which represented the full amount of trouble which the libellants had saved him, they should have accepted the offer. They were likewise bound to accept the offer of his steam winch, their own appliances being inadequate, by which they would have saved a day and a large expense. The net result of their exertions is that the true and known owners of the property have met with delay, trouble, and the expenses of a lawsuit, all growing out of the mistaken notion that possession of another man's property gives the possessor a right to deal with it as he pleases. The cases of ships or goods picked up at sea, in which there can be no reasonable ground to believe that the owners would ever have seen them again, if the salvor had not happened to find them, have no application to an anchor and chain lost in a known spot within the limits of the port where the vessel is lying. Considering that this is the first case of the kind, I shall allow the libellants the \$25 without costs, though in the next case of the kind salvage will probably be refused. *Decree accordingly.*”

The existence of the unwritten law of the harbor, to which the learned judge refers, would seem to furnish an argument to those who believe that the Norse Vikings were the earliest settlers on the coast.

## MICHIGAN.

**PARTNERSHIP.**—*Smith et al. v. Sheldon et al.* — **SUPREME COURT.** — An interesting question regarding the relations of outgoing partners and the creditors of the firm arose in this case. Smith, Place, and Owen, who were partners, and as such indebted to the defendants in error, dissolved in June, 1867; Place buying the assets of the concern and assuming its liabilities, including that to the defendants. The defendants soon after had notice of this arrangement, and, without the knowledge of the plaintiffs, took from Place a note in the firm's name for the amount of their debt, payable at one day, with ten per cent. interest, but did not agree to receive the note in payment of the partnership indebtedness. Place became insolvent in 1872, and the plaintiffs were called on to pay the note. The defendants contended in the court below that, as they had never received payment of their bill, they were entitled to recover it of those who made the debt, — the giving of the note, which had remained unpaid, being immaterial, — but the plaintiffs insisted that, after the dissolution and notice to the defendants, the plaintiffs stood simply as sureties to Place, and that any dealings with him to the prejudice of the plaintiffs would discharge them from that liability; and that the giving him time, however short, was, in law, injurious to them. The opinion of the court (per COOLEY, C. J.), after deciding that, in the absence of express authority, Place had no right to give the note, proceeds:—

“For a determination of the question whether Smith and Owen were entitled to the rights of sureties, it seems only necessary to point out the relative positions of the several parties as regards the partnership debt. Place by the arrangement had agreed to pay this debt, and as between himself and Smith and Owen he was legally bound to do so. But Smith and Owen were also liable to the creditors equally with Place, and the latter might look to all three together. Had they done so, and made collection from Smith and Owen, these parties would have been entitled to demand indemnity from Place. This we believe to be a correct statement of the relative rights and obligations of all.

“Now a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds taken. The relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one party is surety merely, it is only just to require of him that, in any subsequent action he may take regarding the debt, he shall not lose sight of the surety's equities.

“That Smith and Owen were sureties for Place, and the latter was principal debtor after the dissolution of the copartnership, seems to us unquestionable. It was then the duty of Place to pay this debt, and save them from being called upon for the amount. But if the creditors, having a right to proceed against them all, should take steps for that purpose, the duty of Place to indemnify and the right of Smith and Owen to demand indemnity were clear. Every element of suretyship is here present; as much as if, in contracting an original indebtedness, the contract itself has been made to show on its face that one of the obligors was surety merely.

As already stated, it is immaterial how the fact is established, or whether the creditor is or is not a party to the arrangement which establishes it.

"This view of the position of the parties indicates clearly the right of Smith and Owen to the ordinary rights and equities of sureties. The cases which have held that retiring partners thus situated are to be treated as sureties merely, have attempted no change in the law, but are entirely in harmony with older authorities, which have only applied the like principle to different states of facts, where the relative position of the parties as regards the debt was precisely the same. We do not regard them as working any innovation whatever. The cases we particularly refer to are *Oakely v. Passeller*, 4 Cl. & Fin. 207; *Wilson v. Lloyd*, L. R. 16 Eq. Cas. 60; and *Mollard v. Thorn*, 56 N. Y. 402.

"And it follows, as a necessary result from what has been stated, that Smith and Owen were discharged by the arrangement made by the creditors with Place. They took his note on time, with knowledge that Place had become the principal debtor, and without the consent or knowledge of the sureties. They thereby endangered the security of the sureties, and, as the event has proved, indulged Place until the security became of no value. True, they gave but very short time in the first instance; but as was remarked by the Vice-Chancellor in *Wilson v. Lloyd*, L. R. 16 Eq. Cas. 60, 71, 'the length of time makes no kind of difference.' The time was the same in *Fellows v. Prentiss*, 3 Denio, 512, where the surety was also held discharged; and see *Okie v. Spencer*, 2 Wheat. 258.

"But that indulgence beyond the time fixed was contemplated when the note was given, is manifest from the fact that it was made payable with interest. In a legal point of view, this would be immaterial; but it has a bearing on the equities, and it shows that the creditors received or bargained for a consideration for the very indulgence which was granted, and which ended in the insolvency of Place. When they thus bargain for an advantage which the sureties are not to share with them, it is neither right nor lawful for them to turn over to the sureties all the risks. This is the legal view of such a transaction; and in most cases it works substantial justice."

## MISSOURI.

**EQUITY. — INJUNCTION AGAINST THREATENED LIBEL. —** *Life Association of America v. Boogher*. — St. Louis Court of Appeals. The plaintiffs, an insurance company, filed their bill, alleging that the defendant had composed and published libels respecting them; that the defendant threatened still further to print and publish libellous statements regarding the plaintiffs' business, for the purpose of injuring it; and that the defendant was wholly insolvent and unable to respond in damages. The prayer was for an injunction to restrain the threatened publication. The defendant demurred, among other grounds, for the reason that a court of equity has no jurisdiction to restrain the publication of a libel. The opinion of the court (GANTT, J.), after some discussion of the clause in the constitution of Missouri which provides "that every person may freely speak, write, or print on any subject, being responsible for the abuse of that liberty," proceeds: —

"In Great Britain, there is no such thing as what we understand by the term 'organic law.' The king, lords, and commons of that country can, whenever so minded, effect any conceivable change in the institutions of the United Kingdom. Hence, there is no fundamental or constitutional law in that country, securing freedom of



speech or of the press, though there is no land in which that freedom is practically more assured. But not even in that country, where the rigid restraints which bind our government do not exist, have any of its courts, since the abolition of the Court of Star Chamber, asserted the jurisdiction which the plaintiff invokes. When, in the hurry of a trial at *Nisi Prius*, an expression fell from the lips of the presiding judge, tending to the assertion of such a jurisdiction, or rather imagining such a jurisdiction to be vested in another court, the intimation, though plainly *obiter dictum*, alarmed the vigilance of the English bar, and occasioned an unmistakable protest. In the case of *Du Bost v. Beresford*, 2 Camp. 511, Lord Ellenborough, at *Nisi Prius*, let such an expression fall. This was in 1810, a time when Tory views of government were in the ascendant. In the edition of the State Trials, by Howell, in 1816 (vol. xx., note to page 798), the learned and careful editor, annotating the case of *Rex v. Horne*, tried before Lord Mansfield in 1777, says: "Not unconnected with the law of libel upon which Mr. Horne said so much in this case, is the *dictum* of Lord Ellenborough in the case of *Du Bost v. Beresford*, 2 Campbell's *Nisi Prius*, 511, being an action for destroying a picture which was publicly exhibited, but which was largely defamatory of a gentleman and his wife, who was defendant's sister, Lord Ellenborough (C. J. K. B.) said: 'If it was a libel upon the persons introduced into it, the law cannot consider it valuable as a picture. Upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition, and the plaintiff was both civilly and criminally liable for having exhibited it.'" "I have been informed by very high authority," proceeds Mr. Howell, "that the promulgation of this doctrine relating to the Lord Chancellor's injunction excited great astonishment in the minds of all the practitioners of the courts of equity, and I had apprehended that this must have happened, since I believe there is not to be found in the books any decision or any *dictum* posterior to the days of the Star Chamber, from which such doctrine can be deduced, either directly or by inference or analogy, unless, indeed, we are to except the proceedings of Lord Ellenborough's predecessor, Scroggs, and his associates, in the case of *Henry Care*, in which case it was ordered that the book entitled the 'Weekly Packet of Advice from Rome, or the History of Popery,' be not further printed or published by any person whomsoever." The case of *Care* is to be found in 7 Howell's State Trials, p. 1111. A case was tried in 1680, in the reign of Charles II.; Scroggs, C. J., presided, and Jeffries prosecuted. This, it seems, furnished the only precedent, since the abolition of the Court of Star Chamber, on which Lord Ellenborough could have relied. The law, as laid down in England by Lord Eldon, in 2 Swanston, 412, 418, *Gee v. Pritchard*, and by Lord Langdale, in 11 Beavan, p. 112, *Clark v. Freeman*, and in New York by Chancellor Walworth, in 8 Paige, 24, *Brandreth v. Lancu*, utterly repudiates the decision of Scroggs and the unguarded *dictum* of Ellenborough. The last authority is that of an American court, which treats almost contemptuously the suggestion that the publication of a libel may be enjoined. To the same effect, see § 948 a of 2 Story Comm. on Eq. Jurisp. (11th edition).

"No case is cited by the learned counsel for appellant in which the jurisdiction here claimed has been exercised. All that they venture to suggest is, that the various English courts which have refused to exercise such a jurisdiction have placed their refusal on grounds which do not make such refusal certainly apposite to the circumstances shown by this petition. The refusal has been uniform. The reasons assigned for it have been various, according to the peculiarities of the cases in which they were given. To argue from the qualifications of so many concurring refusals, that it may be inferred that, but for the qualifications, the refusals would not have been made, would be an exceedingly unsafe line of argument anywhere."

## PENNSYLVANIA.

**EMINENT DOMAIN. — SUPREME COURT. — *Darlington v. United States.***  
 — By act of Congress of March 3, 1873, the Secretary of the Treasury was authorized "to purchase at private sale, or if necessary by condemnation in pursuance of the statutes of Pennsylvania," a piece of ground in Pittsburg, for the erection of certain public buildings. By act of April 2, 1873, the State of Pennsylvania consented "to the acquisition by the United States" (of the lands needed) . . . "by condemnation in the same manner as land is now taken for public purposes under any . . . statute for railroad or other purposes." The United States proceeded, pursuant to the Pennsylvania statute, to condemn a parcel of land of the plaintiff. The plaintiff resisted the proceedings, for the reason, among others, that the legislature "cannot delegate the power of eminent domain." On this point the court (PAXSON, J.) says: —

"The State may take the property of a citizen for public use by virtue of the right of eminent domain; but it cannot take it for the benefit of another sovereignty for the use of the citizens of the latter, nor can it delegate the right of eminent domain to another sovereignty for such purpose. I am aware that it has been held otherwise in *Gilmer v. Lime Point*, 18 Cal. 229, and in *Burt v. The Merchants' Ins. Co.*, 106 Mass. 356. But a different doctrine was asserted in *Trombley v. Humphrey*, 23 Mich. In that case, speaking of the exercise of the power by the State for the United States, the court says: 'For the one to enter the sphere of the other, and supply its officers and machinery in the exercise of its eminent domain for the benefit of the other, would not only be as much without warrant, but also as much a work of supererogation, as for the United States to exercise the like authority and employ the like agencies for a foreign country.' Again: 'the eminent domain in any sovereignty exists only for its own purposes; and to furnish machinery to the general government, under and by means of which it is to appropriate land for national objects, is not among the ends contemplated in the creation of the State governments.' The foundation of the right of eminent domain is a necessity. The reason utterly fails when one sovereignty proceeds to take land for the use of another sovereignty. This seems to be the view taken by the Supreme Court of the United States in *Kohl v. The United States*. Says Justice STRONG: 'The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond this there exists no necessity, which alone is the foundation of the right.' It is not a sufficient answer to this to say that the public buildings proposed to be erected are for the accommodation of our own citizens. That is a secondary object. The primary object is the accommodation of the business of the United States government and the convenience and comfort of its officials. The citizens of this State have no rights in said buildings not common to all other citizens of the United States; nor have they any control over them."

## ENGLAND.

**PETITION OF RIGHT. — COURT OF APPEAL. — *Rustomjee v. The Queen.***  
 We have already noticed the decision made by the Queen's Bench division of the High Court in this case (10 Am. Law Rev. 792). This decision has now been affirmed by the Court of Appeal, and the case has excited much attention

on account of the supposed analogy between the position of the petitioner, and that of the parties who claim a share in the Alabama award. The facts were these. The petitioner, a British subject, was engaged in business in Hong Kong in 1838. Certain Chinese merchants, licensed by their government to trade there, had formed a company called a "Cohong," by whose rules, if any member indebted to a foreign merchant failed to pay, all the members became liable for the debt. The claim was examined, and, if found correct, was entered on the company's books, and payment was enforced. A member of the Cohong indebted to the petitioner failed; but, before the claim could be examined and entered, war broke out between England and China. The petitioner thereupon sent his claim to Captain Elliott, the then superintendent of trade of British merchants in China, who promised that the Chinese government should be made to pay it when terms of peace were arranged. Afterward, Sir Henry Pottinger, Elliott's successor, promised the petitioner, during the negotiations for peace, that his claim should be insisted on. A treaty of peace was made in 1842, by which the Emperor of China promised to pay the Queen \$3,000,000, 'as and for the amount of debts due to British subjects by Hong merchants,' and the money was paid over.

The petition prayed that the Queen would direct the payment of the petitioners' claim. The Attorney-General demurred, and the demurrer was sustained by the Queen's Bench. In delivering their opinion in support of the decision below, the Court of Appeal says:—

"The treaty of 1842 between her Majesty and the Emperor of China, being an act of state, was referred to, both in the court below and before us, to ascertain the exact words upon which the supposed obligation had arisen. The fifth article of that treaty, after providing for a certain amount of freedom of trade on the part of British merchants residing in China, proceeds as follows: 'And His Imperial Majesty further agrees to pay to the British government the sum of three millions of dollars, on account of debts due to British subjects by some of the said Hong merchants, or Cohong, who have become insolvent, and who owe very large sums of money to subjects of Her Britannic Majesty.' The sum is paid in gross, or in the rough, not as the ascertained total amount, but 'on account of' debts due to British subjects by Chinese merchants, who are said to owe, not 'three millions of dollars,' nor 'the said sum,' but 'very large sums of money,' to British subjects. The money was paid to the British government, not for British subjects, but 'on account of debts due to British subjects.' It was paid as a lump sum in round figures. No specific sum was ever ascertained, either between the two governments, or between the British government and the supplicant, as the amount of the supplicant's claim, and it is plain that no such specific sum was ever considered between the plenipotentiaries who negotiated the treaty. It is not, therefore, correct to say, as the supplicant does in his petition, that this money was ever paid to the plenipotentiaries of the Queen, 'for the purpose of paying his claim;' it was never received for such a purpose; and upon the true construction of the language of the treaty, quite apart from higher and wider considerations, we think that the case of the supplicant must fail.

"Secondly, upon these higher and wider considerations, as to which, in a case of this kind, we ought not to abstain from expressing an opinion, we think he fails also. We assent, upon full consideration, to the reasoning of the judges in the court below. The making of peace and the making of war, as they are the undoubted, so they are, perhaps, the highest, acts of the prerogative of the Crown. The terms on which

peace is made are in the absolute discretion of the sovereign. If Captain Elliott did (to use the words of the petition) promise that the Queen would compel the Chinese government to pay these claims when terms of peace were arranged; if Sir Henry Pottinger did promise that these claims should be insisted on, and should be paid, they both exceeded their authority, and promised what they had no power to perform, or to pledge the Queen to perform. The Queen might or not, as she thought fit, have made peace at all; she might or not, as she thought fit, have insisted on this money being paid to her. She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own courts. It is a treaty between herself as sovereign and the Emperor of China as sovereign; and though he might complain of the infraction, if infraction there were, of its provisions, her subjects cannot. We do not say that under no circumstances can the Crown be a trustee; we do not even say that under no circumstances can the Crown be an agent; but it seems clear to us, that in all that relates to the making and performance of a treaty with another sovereign the Crown is not, and cannot be, either a trustee or an agent for any subject whatever.

"We do not, indeed, doubt that, on the payment of the money by the Emperor of China, there was a duty on the part of the English sovereign to administer the money so received according to the stipulations of the treaty. But it was a duty to do justice to her subjects according to the advice of her responsible ministers; not the duty of an agent to a principal, or of a trustee to a *cestui que trust*. If there has been a failure to perform that duty, which we only suggest for the sake of argument, it is one which Parliament can and will correct; not one with which the courts of law can deal. It is, indeed, in the highest degree unlikely that there has been, or ever will be, such a failure. In this country, five and thirty years would not have run their course without the attention of Parliament being called to the unjust withholding of money by the English government from an English subject entitled to it. But, whether this is so or not, it is to Parliament alone that the supplicant can have recourse."

We print the judgment of the court somewhat at length, because we wish to correct the mistaken idea that this case lends any support to the pretensions of those who have claimed that Congress has the right to divert the money which the United States received from the purposes for which it was paid, and apply it to others for which it was never intended. The court does not decide that the Crown has the right to apply money received for the subject to another purpose. The language is express: "We do not doubt that there was a duty on the part of the English sovereign to administer the money so received according to the stipulations of the treaty." The court decides only that the duty is one the performance of which Parliament alone can enforce. Our Congress, charged with the same duty, can plead no lack of power as an excuse for failing to perform it.

MR. THOMAS LEWIN, the well known author of "Lewin on Trusts," died January 5th. Mr. Lewin, who was born in 1805, was a graduate of Trinity College, Oxford, and was called to the bar at Lincoln's Inn in 1833. He was one of the six conveyancing counsel of the court appointed by Lord St. Leonards on the passage of the Court of Chancery Amendment Act in 1852. Aside from his professional reputation, Mr. Lewin was well known as an

author and scholar. After somewhat extended travels in the East, he brought out in 1851 "The Life and Epistles of St. Paul." In 1861, he put forth a book on the topography of Jerusalem. He was also the author of "Fasti Sacri," or "A Key to the New Testament Chronology," and of "The invasion of Britain by Julius Cæsar." His extreme carefulness is shown by the fact that he made a special visit to the Holy Land to verify the statements contained in his Life of St. Paul.

**MAGISTRATES' DECISIONS.** — There would seem to be a growing want of care or of capacity on the part of English magistrates in finding out what the matters with which they are called upon to deal really are. Some little time ago a man was brought before Sergeant Cox, charged with an attempt to steal, and convicted. The court proceeded to sentence him to five years' imprisonment, the maximum punishment allowed by law for an "attempt" being three years, — and that against the remonstrance of the prisoner, who exclaimed, "Five years for an attempt! It is only three." The prisoner was afterwards brought back into court, when it was explained to him that the court supposed he had been convicted of stealing, and not merely of the attempt to steal, and the punishment was reduced. Another incident of the same sort occurred recently at the Quarter Sessions held at Exeter. The *Law Times* says: —

"A singular incident occurred at the recent Quarter Sessions held at Exeter. A prisoner was convicted of having stolen four books from an inn, and sentenced to twelve months' imprisonment. He was duly transferred to the jail, his beard was shaven off, and his hair close cropped, in conformity with the prison regulations. The grand jury, however, had found no true bill. Through some oversight this fact had been overlooked, and the case was called on as though a true bill had been found. The facts becoming known, the prisoner was again brought up and ordered to be discharged. An interesting question might, under the circumstances, be raised, Has the prisoner any right of action for false imprisonment? If so, against whom should it be brought? After all, the most curious circumstance in the whole affair is that one jury should convict upon evidence which the other jury did not think sufficient to indicate even a *prima facie* liability. Such a circumstance is not calculated to make the public repose confidence in the verdict of juries."

We venture to add that the magistrate does not seem clear of blame.

**WOMEN AS LAWYERS.** — The Council of University College, London, have awarded the Joseph Hume Scholarship in Jurisprudence to a lady who has already taken the first place in all that women are permitted to attend at that institution, and who is now working her way in such active business at the law as is allowed to persons who are not called to the Bar.

**LAW BOOKS.** — The rapid increase in the number of volumes of reports is a frequent subject of complaint. It would seem, however, that the number of books on law increases no less rapidly. There were published in Great Britain in the year 1876, 101 new books on law and jurisprudence, and 63 new editions of earlier works on law.

## CORRESPONDENCE.

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TO THE EDITORS OF THE "AMERICAN LAW REVIEW:"—

BALTIMORE, Jan. 5, 1877.

"Gentlemen,—In your criticism upon 'Fraudulent Conveyances,' you say that I have not cited the 'leading and well known case' of *Winchester v. Clark*, reported in 12 Allen, 605. Now, if you will take the pains to examine the report, you will find that there is no such case there; moreover, no such case has ever been decided.

"The case that is 'leading and well known' is the case of *Winchester v. Charter*, 12 Allen, 606. This case was before the court three times; to wit, 12 Allen 606, 97 Mass. 140, and 102 Mass. 272. If you will turn to page 311 of 'Fraudulent Conveyances,' you will find the case correctly cited, together with all reports of it.

"Your criticism covers two pages, and in that you have committed three blunders: you misnamed a case by citing *Winchester v. Charter* as *Winchester v. Clark*; you cited it from 12 Allen 605, instead of 12 Allen 606; you erroneously charged that I had omitted it. If you can commit three blunders in two pages in reference to a decision in your own State, what indulgence ought to be allowed to an author who cites five thousand cases, and fills six hundred pages?

"I do not undertake to say that there are no errors in the work. I am too well aware of the difficulty of finding all the cases where they are so numerous, and of giving the substance of the decisions, to make any such assertions. But I do say that thus far you have failed most signally to point them out.

"The criticism, moreover, shows the precise value of criticisms generally on law-books. In order to criticise justly, the critic should be as thoroughly master of the subject as the author is. This rarely happens: consequently the critic, when he ventures on any thing beyond vague generalities, only too frequently lays himself open to a criticism that is more just than his own.

"The law for which you cite *Smith v. Vodge*, you will find on page 312 *et seq.*

"In regard to criticism on style, permit me to say that I prepare my books to suit myself; and if they cite cases correctly, and give the law accurately, I am indifferent to mere style. Trusting that you will do me the justice to print my reply,

"I remain yours truly,

"ORLANDO F. BUMP."

We willingly publish this letter from Mr. Bump, in order that we may correct an error in our last number, by which some injustice was done to that gentleman. The reviewer accidentally wrote the name of the defendant wrong in making a minute of *Winchester v. Charter*, after examining it in 12 Allen; and, as Mr. Bump cites it from 94 Mass. instead of 12 Allen, a method of citation not familiar to us, the error was not discovered. The faults in the work to which we especially called attention were not sins of omission, and the errors of a critic can hardly be considered in set-off to the faults of a law-book. In regard to the law laid down in *Smith v. Vodge*,

Mr. Bump says, "you will find it on page 312 *et seq.*" The "*et seq.*" was what we especially objected to.

With Mr. Bump's remarks in regard to his style, we cordially agree. We trust, however, that he will not feel offended by Macaulay's remark, that "it is not by his own taste, but by the taste of the fish, that the angler is determined in his choice of bait." — Eds.

We have received a letter in reference to the story of Mr. Greenleaf and General Fessenden told in the notice of "Greenleaf on Evidence," which was published in our last number. We should be glad to print it in full, but are prevented by want of room. The writer requests us to publish an extract from "A History of the Law, the Courts, and the Lawyers of Maine, by William Willis," which contains, he tells us, the true version of the anecdote. It does not differ materially from the story as we told it, except that the part taken by Mr. Greenleaf in our version is ascribed by Willis to General Fessenden. "*Non nostrum tantas componere lites.*"

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THE CASE OF THE "FRANCONIA."

FEBRUARY 17, 1876, a collision took place in the English Channel, off Dover, one mile and nine-tenths of a mile from Dover pier, and within two and a half miles of Dover beach, between the English steamer *Strathclyde* and the German steamer *Franconia*. A hole was pierced in the hull of the *Strathclyde*, which soon sunk, and many lives were lost. The *Franconia* made no attempt to render assistance ; but steamed away, without lowering its boats into the water. The excuse of the German captain was that he supposed his own vessel to have been badly injured ; and that the English pilot on board, who was not then in charge, but had been a very short time before, having been sent to ascertain the extent of damage, returned and cried out, " For God's sake ! put the helm a-port, and run to the shore : I think our ship is going to sink too." Cross-actions of collision between the two vessels were tried about the 1st of May, 1876, in the admiralty division of the High Court of Justice, before Sir Robert Phillimore and two elder brethren of the Trinity House, by whom the *Franconia* was adjudged wholly to blame. An appeal was taken, which was heard in December, before James, Lord Justice, and Baggallay and Brett, admiralty judges ; and resulted in an affirmation of the judgment below, and a dismissal of the appeal.

Meantime, Ferdinand Keyn, the German captain, was arrested at Dover, on the charge of manslaughter by negligence. He was tried at the Old Bailey, in April, according to the course of the common law in the Central Criminal Court, before Pollock, B.,



and a jury, and found guilty ; whereupon the presiding judge reserved the question whether that court had jurisdiction. The Central Criminal Court has power to hear and determine offences " committed on the high seas and other places within the jurisdiction of the admiralty of England."

The question of jurisdiction was twice argued before the court for crown cases reserved : the first time before five judges, who, differing in opinion, ordered a reargument. This was had in June, 1876, before fourteen judges, one of whom died before the judgments, and the others delivered their opinions in November, holding, seven to six, that the court had no jurisdiction.

The Crown was represented by the Attorney and Solicitor Generals, with other assistants ; and the leading counsel for the *Franconia* in the collision suits, as well as for the defendant in the criminal trial, was Benjamin, Q. C., formerly a distinguished member of the bars of Louisiana and the Supreme Court of the United States ; for years a Senator from Louisiana ; afterwards Attorney General, Secretary of War and of State for the Rebel Government ; who fled to England at the close of the rebellion, and, being called to the English bar at upwards of fifty-five years of age, has attained there, with inconceivable rapidity, an enormous practice and a conspicuous position.

We do not propose to review exhaustively this cause, which is likely long to be celebrated ; but simply to call attention to a few of the points involved, which seem to us important and interesting : —

*First.* All the judges appear to have agreed that the limits of English counties extend only to low-water mark. Thus, Sir Robert Phillimore said : —

" The jurisdiction which now exists over offences committed at sea is that which was once possessed by the court of the admiral. The county extends to low water mark, where the ' high seas ' begin. Between high and low water mark, the courts of Oyer and Terminer had jurisdiction when the tide was out ; the court of the admiral, when the tide was in."

Chief Justice Cockburn declared : —

" Whatever of the sea lies within the body of a county is within the jurisdiction of the common law ; whatever does not, belonged formerly to that of the admiralty, and now belongs to the courts to which the jurisdiction of the admiral has been transferred by statute ; while in the estu-

aries or mouths of great rivers, below the bridges, in the matter of murder and mayhem, the jurisdiction is concurrent. On the shore of the outer sea, the body of the county extends so far as the land is uncovered by water. And so rigorous has been the line of demarcation between the two jurisdictions, that, as regards the shore between high and low water mark, the jurisdiction has been divided between the admiralty and the common law, according to the state of the tide. Such was the law in the time of Lord Coke, and such it is still."

Apparently, all the judges concurred in this statement. Indeed, all who were in favor of sustaining the conviction must necessarily have done so, since, if the manslaughter had been committed within the body of the county of Kent, the Central Criminal Court, an admiralty tribunal, could have had no jurisdiction, and the defendant must have been tried at the assizes for that county. It is by no means clear, upon the authorities, that the same rule as to county limits is established in the United States. In a very learned note to *Commonwealth v. Roxbury*, 9 Gray, 512, the present Chief Justice of Massachusetts remarks: "The boundaries of counties are co-extensive with the limits of the Commonwealth, for all purposes not affected by the constitution and laws of the United States." Of course this qualification merely means, that, for certain purposes within these limits, the sovereignty of the Commonwealth may be subordinate to that of the United States, under its Constitution and laws. The annotator could not have intended it to be understood that the limits of counties, as territorial divisions, shift or vary according to circumstances. In the opinion of Chief Justice Shaw, in the case annotated, it is said: "Counties are composed of towns; and for many purposes the body of the county extends not only over the shores of the sea, but to some distance below the ebb of the tide,—for many purposes of civil and criminal proceedings, and for some purposes of jurisdiction." Previously, the same court had held, that "all creeks, havens, coves, and inlets lying within projecting headlands and islands, and all bays and arms of the sea lying within and between lands not so wide but that persons and objects on the one side can be discerned by the naked eye by persons on the opposite side, are taken to be within the body of the county." *Commonwealth v. Peters*, 12 Met. 392. Very many authorities, English and American, sustain the accuracy of this statement. The question of difficulty is, How far do the boundaries of counties

extend, not upon bays and harbors "*inter fauces terræ*," but off the coast, "upon the shores of the outer sea"? This question as to the limits of counties can arise only upon the assumption that the territorial domain of the State extends beyond low-water mark. If the line of the State stops there, that of the county can, of course, go no further; but if the territorial domain of the State extends a marine league farther, is the boundary of the county co-extensive therewith? In New York, under a penal statute of no extra-territorial force, an action was brought by an administrator to recover damages for causing the death of his intestate by drowning, in consequence of a collision between a sloop, on board of which he was, and a steamboat owned by the defendant corporation. The case depended entirely on the question, whether the waters of Long Island Sound, below low-water mark, within a mile off shore, were within the State of New York. The court said, "We think there is no force in the suggestion, that, if the State owns to the centre of the sound, a considerable part of our domain is not partitioned into counties and towns. Even if the statute, in declaring the bounds of the counties bordering on the sound had limited them in terms to the line of low-water mark, it would indicate nothing but the mere fact that the legislature had deemed their extension to the exterior water-line of the State a matter of no practical importance; but, in the absence of any such limitation, we are clearly of opinion that the respective counties and towns which are bounded generally on the sound comprehend within their limits the waters between their respective shores and the water-line of the State." *Mahlee v. Transportation Co.*, 35 N. Y. 358.

In November, 1859, an indictment for kidnapping was tried in the Superior Court for Barnstable County, where the offence consisted in the transfer of a fugitive slave from the brig on which he had concealed himself, at Pensacola, to another vessel, with a view to return him to slavery in Florida. The two vessels were lying off Hyannis, far beyond low-water mark, though less than three miles from the shore. The defence claimed that the crime was not committed within the body of the county of Barnstable; the government, that the place was a part of a bay or harbor *inter fauces terræ*. The principal question submitted to the jury, who returned a verdict of "Not guilty," was whether the limits of

the county extended to the place where the two vessels lay, from one to the other of which the fugitive was transferred. The court held that these limits extended between the points of land, as far as objects could reasonably be discerned, from shore to shore, and no farther. In the course of the trial, the presiding judge remarked, "If the jurisdiction of the State extends to the distance of a marine league from the shore, as I suppose it does, it does not follow, as a matter of course, that the jurisdiction of the county of Barnstable extends to that distance. I do not find any authority to that effect." This *nisi prius* ruling was made by one of the ablest men of his day,<sup>1</sup> who shortly after declined the place of Chief Justice of Massachusetts, upon the resignation of Shaw, C. J. But we refer to it, chiefly because it led to the immediate passage of the following statute, 1859, c. 289 (Gen. St. c. 1, § 1.):—

"The territorial limits of this Commonwealth extend one marine league from its sea-shore at low-water mark. When an inlet or arm of the sea does not exceed two marine leagues in width between its head-lands, a straight line from one head-land to the other is equivalent to the shore line. The boundaries of counties bordering on the sea extend to the line of the State as above defined. The jurisdiction of counties separated by waters, within the jurisdiction of the State, is concurrent upon and over such waters."

The validity of so much of the foregoing enactment as declares the boundaries of counties to be co-extensive with the territorial limits of the Commonwealth is obviously indisputable. To the remaining provisions of the section we shall refer hereafter.

*Second.* Chief Justice Cockburn occupies considerable space in criticising and controverting the statement in Hale's Pleas of the Crown, vol. ii. p. 12, that, prior to the 35 Edw. III., A.D. 1362, the court of King's Bench had usually cognizance of treasons and felonies done on the narrow seas, though out of the boundaries of counties. He reviews at length the eight cases cited in support of this *dictum*; and arrives at the conclusion, that the King's Bench, in dealing with cases occurring below low-water mark, and therefore *dehors* the limits of any county, was deemed to be exceeding its lawful authority. The probability is,

<sup>1</sup> Charles Allen, of Worcester, to whose memory we cannot refrain from paying a passing tribute of affectionate respect.

he says, that the exercise of this jurisdiction was looked upon as a usurpation which it was thought necessary to restrain. But Sir Travers Twiss, the learned writer on international law, in an article<sup>1</sup> called forth by the case of the *Franconia*, has given a full account of the most ancient case on the subject decided in 25 Edw. I., A.D. 1297, in which the judges of this court used strong language as to their jurisdiction upon the high seas. One of them, Metingham, J., declaring, "We say we have as much power to take cognizance of an act done upon sea as upon land."

Curiously enough, in a recent Massachusetts case, Gray, C. J., has taken occasion to apply to this question his remarkable powers of research. He says, "In the most ancient times of which we have any considerable records, the English courts of common law took jurisdiction of crimes committed at sea, both by English subjects and by foreigners."<sup>2</sup> In the course of his dissertation he quotes at length from Sir Matthew Hale's unpublished treatise on the admiralty jurisdiction, preserved among the Hargrave MS. in the British Museum; a copy of which, procured more than forty years ago by Charles Sumner for Judge Story, is now the property of the Chief Justice. We will quote sentences only from Lord Hale's treatise: "Anciently, at common law, criminal causes done upon the high sea were heard and determined in the King's Bench, upon an indictment in an adjacent county . . . The jurisdiction of the common law is far more ancient than that of the admiralty, and the latter of no ancients addition than Edw. I." On the whole, we think that Chief Justice Cockburn is mistaken in supposing this jurisdiction to have been usurped, and in excess of the rightful authority of the King's Bench. But little more than antiquarian interest can attach to such a discussion at the present day.

*Third.* The Crown claimed a conviction on the ground that the crime was committed upon a British vessel, and therefore within English territorial jurisdiction. This contention was the occasion of much ingenious and subtle reasoning. The deceased, when drowned, was on board an English steamer; and the defendant, having caused her death, was therefore guilty, said the minority

<sup>1</sup> *Law Magazine*, February, 1877.

<sup>2</sup> *Commonwealth v. McLoon*, 101 Mass. 1.

of the court. If it had been an intentional and malicious act, this might have been so, answered the majority; but an act of negligence was the only thing chargeable upon the accused, and that was wholly committed on the German steamer beyond English jurisdiction. Mr. Benjamin is said to have admitted that a foreigner would be liable for murder committed within the three-mile belt. His words were, "If a man intentionally fires at a man, I should not contest it might be murder, whether I carry that admission too far or not."<sup>1</sup> This concession, and the argument of the minority on the point, were founded mainly on the authority of *Rex v. Coomes* (1 Leach, Cr. C. 388; East P. C. p. 367), in which, on a trial for murder under an admiralty commission, all the judges held, that where a shot had been fired from the shore at a person in a vessel on the sea, and had killed him there, the offence was cognizable in admiralty. Chief Justice Cockburn said, that case, "in my opinion, was rightly decided, and I think the same principle would apply where the master of a vessel purposely ran down another, and by so doing caused the death of a person on board. For, though his immediate act is confined to running his ship against the other, it is, nevertheless, his act which causes the ship run down to sink. It is as much his act which causes the death of the person drowned as though he had actually thrown such person into the water. If, therefore, the defendant had purposely run into the *Strathclyde*, I should have been prepared to hold that the killing of the deceased was his act, where the death took place; and consequently that the act — in other words, the offence of which he has been convicted — had been committed on board a British ship. Whether the same principle would apply to a case of manslaughter arising from the running down of another ship, through negligence, or to a case where death is occasioned by the careless discharge of a gun, is a very different thing, and may admit of serious doubt. For, in such a case, there is no intention accompanying the act into its ulterior consequences. The negligence in running down a ship may be said to be confined to the improper navigation of the ship occasioning the mischief: the party guilty of such negligence is neither actually, nor in intention, and thus constructively, in the ship on which the death takes place."

<sup>1</sup> Opinion of Grove, J.

This subtle distinction between murder and manslaughter is wholly repudiated by the minority of the judges, inasmuch as it is founded upon the hypothesis, that one who intentionally causes a homicide in another jurisdiction is constructively present where the act is done; but that one who, under the same circumstances, by reckless negligence causes death, is not constructively present when the consequences of his negligence occur. It would seem to follow, that, where homicide is intentional, but reduced by adequate provocation to the grade of manslaughter, the defendant would be equally amenable as if his offence were murder. So that manslaughter by negligence is the only kind of criminal homicide excluded by this part of the reasoning of the Chief Justice, where the act is done in one jurisdiction, and the actor is in fact personally elsewhere. But he does not leave the argument thus: he proceeds to maintain that the true question is not, whether the death, which no doubt took place in a British ship, was the act of the defendant in such ship, but whether the defendant, at the time the act was done, was himself within British jurisdiction. His language is:—

"In order to render a foreigner liable to the local law, he must, at the time the offence was committed, have been within British territory if on land, or in a British ship if at sea . . . According to the doctrine of Lord Coke, in Calvin's case (5 Co. R.), protection and allegiance are correlative; or, as I prefer to put it, it is only for acts done when the person doing them is within the area over which the authority of British law extends, that the subject of a foreign State owes obedience to that law, or can be made amenable to its jurisdiction."

In an earlier part of the opinion he had said:—

"The jurisdiction of the admiral, though largely asserted in theory, was never, so far as I am aware, — except in the case of piracy, which, as the pirate was considered the *communis hostis* of mankind, was triable anywhere, — exercised, or attempted to be exercised, in respect of offences, over other than English ships. No instance of any such exercise, or attempted exercise, after every possible search has been made, has been brought to our notice."

And again he says: "The admiral never had jurisdiction over foreign ships on the high seas."

We pass by, for want of space, the discussion of these interesting questions as to the jurisdiction of English admiralty and

common-law courts. The Federal courts have no common-law criminal jurisdiction; but take cognizance solely of crimes punishable under express statutes of the United States. By successive enactments, both murder and manslaughter, resulting from blows, wounds, or poisoning on the high seas, are punishable where the death takes place on land. Although the language of these statutes is general, yet they are not held to extend to the acts of foreigners on board foreign vessels. The same construction has been put in England upon the St. of 9 Geo. IV. c. 31, § 8. But, in Michigan and Massachusetts, very similar acts have been held to have a more extensive application. In *Commonwealth v. Macloon*, 101 Mass. 1, the officers of a British ship — one of whom was an Englishman, and the others citizens of Maine — maltreated, on board the English vessel on the high seas, an American seaman, so that he died of the injuries thus inflicted in Boston; and they were all three convicted of manslaughter. We have already, in another connection, referred to this very elaborate opinion, which deals exhaustively with all the learning on the subject. We do not think the English statute fairly distinguishable from that of Massachusetts, of which that of Michigan is confessedly in substance a copy. But the principle that a State may properly by statute punish a wrongful act done elsewhere, which has been attended with fatal consequence within its borders, if the guilty party can there be brought to justice, seems to us unobjectionable in theory, and supported by strong considerations of expediency.

To say that one who owes no allegiance to a government is not punishable for an act done beyond its jurisdiction, is a plausible and well-sounding aphorism. In a sea-girt island, the whole of which constitutes a single kingdom, such a statement is naturally accepted as the enunciation of an incontrovertible principle; but, where an invisible line separates two governments along a frontier of thousands of miles, very different views are likely to prevail. A citizen of Northern Maine, New Hampshire, or Vermont, with criminal negligence, may maintain there an insecure dam, which giving way, the flood of rushing waters may destroy property or life in the Dominion of Canada; or he may carelessly let loose a dangerous animal, which may do mischief across the frontier-line; or he may recklessly, but without design, so use a fire-arm as to injure or kill a person



across the border. In all such cases, civil liability for damages is conceded to exist in the jurisdiction where the harm is done, though the guilty person has never been personally there. Is not the power to punish criminally for a tort, if the legislature choose to confer it, co-extensive with the power to exact damages for it in a civil action? To limit criminal jurisdiction over homicide where the fatal deed was done in foreign territory, but death ensued within the realm, to cases of intentional homicide, and to resort to the legal fiction of the constructive presence of the wrong-doer at the place of death, seem to us to establish, by artificial and inconclusive reasoning, an inadequate and unsatisfactory rule. Indeed, Chief Justice Cockburn says: —

"One who from the deck of a vessel, by the discharge of a gun, either purposely or through negligence, kills or wounds another, is not thereby transported from the deck of his own vessel to that of the other. But, in order to render a foreigner liable to the local law, he must at the time the offence was committed have been within British territory, if on land, or, if at sea, in a British ship. I cannot think that, if two ships of different nations met on the ocean, and a person on board of one of them were killed or wounded by a shot fired from the other, the person firing it would be amenable to the law of the ship in which the shot took effect."

We think that this reasoning requires the adoption of the rule, that no one can be punished for any crime not done by him while personally present within the territorial jurisdiction of the sovereignty wherein the act was committed, unless, if absent, he was amenable to its laws because he owed allegiance to its government. For ourselves, we prefer the principle enunciated by Chief Justice Gray in *McLoon's case*, that every government possessing the essential attributes of sovereignty "has the general power to declare any wilful or negligent act, wherever committed, which causes an injury to person or property within its territory, to be a crime, and to provide for the punishment of the offender upon his being apprehended within its jurisdiction." "Whenever any act, which, if committed wholly within one jurisdiction, would be criminal, is committed partly within and partly without that jurisdiction, the question is, whether so much of the act as operates in the State where the offender is indicted and tried has been declared to be punishable by the law of that jurisdiction."

*Fourth*, The main question remains to be adverted to. How

far off shore does the territorial sovereignty of England extend? Are the limits of the realm fixed at low-water mark; or, along the coast, do they include, for general purposes of jurisdiction and dominion, a belt or zone of the breadth of a marine league from the shore? No one of the judges appears to have countenanced the notion of any further extent of sovereignty. The idea of dominion over the narrow seas was universally rejected, even without being asserted in any quarter. In the very powerful judgment of Chief Justice Cockburn, it is scornfully repudiated. But to treat with wrathful scorn conclusions contrary to his own, seems to be an intellectual peculiarity of the Chief Justice; who has, however, fully established his place among the most powerful legal intellects of this generation, — a place to which he would have fairly entitled himself if he had produced nothing else besides his charge to the jury in the Tichborne trial and his judgment in the case under discussion. A kind of careless strength in the general tenor of his discourse, and immense vigor whenever his powers are fully aroused, seem to be his chief characteristics, rather than accurate research and calm judicial impartiality. Throughout the opinion in the *Franconia* case, the abundant citations of authorities appear to bear internal evidence of having been collected for his use by some subordinate rather than of having been derived from original sources by his own laborious investigations.

To the ancient doctrine maintained by Sir Leoline Jenkins, and by Selden in the treatise styled "*Mare Clausum*," he refers in such terms as the following: "All these vain and extravagant pretensions have long since given way to the influence of reason and common sense. The claim to such sovereignty, at all times unfounded, has long since been abandoned." After many such emphatic disclaimers of Britannia's ancient pretensions to rule the waves as a part of her kingdom, he proceeds to deal with the proposition that there is a territorial sea which forms a part of the realm; and he denies altogether that any territorial right of a nation bordering on the sea exists over that portion of the adjacent waters which are within three miles of the coast. "The only distinction known to the law of England as regards the sea," he says, "is such part of the sea as is within the body of a country, and such as is not. Such a thing as sea, which shall be at one and the same time high sea and also part of the territory of the

realm, is unknown to the present law, and never had an existence except in the empty and senseless theory of a universal dominion over the narrow seas." Indeed, he traces back to the ancient assertion of sovereignty over the narrow seas, the origin of the modern doctrine of jurisdiction over the three-mile zone, and rejecting indignantly, as extravagant, the earlier pretensions, he seems to infer that therefore the modern doctrine is untenable: a conclusion which to our mind is a *non sequitur*. He apparently agrees that a nation has the right, under the settled principles of international law, to insist that the sea within three miles of its coast shall be treated, in the event of war between other powers, as neutral territory, within which no warlike operations shall be carried on; and also that foreigners may lawfully be excluded from the fisheries within three miles of the coast. "Possibly," he observes, "it may not be too much to say that, independently of treaty, the three-mile belt of sea might at this day be taken for these purposes as belonging to the local State." But he denies emphatically, and with frequent reiteration, that, independently of legislation, the courts can exercise any territorial jurisdiction beyond low-water mark. If Parliament should see fit to treat the three-mile zone as part of the realm, "that such legislation, whether consistent with the general law of nations or not, would be binding on the tribunals of this country, — leaving the question of its consistency with international law to be determined between the governments of the respective nations, — can, of course, admit of no doubt." But he insists that the power of Parliament to legislate cannot make up for the absence of actual legislation.

Turning to the opinions of the minority of the court, the best statement is found in that of Sir Baliol Brett, who says: —

"The dispute is whether, by the consent of all, certain limited rights are given to the adjacent country, such as the right that the waters should be treated as what is called a 'neutral zone;' or whether the water is, by the consent of all, given to the adjacent country as its territory, with all rights of territory: it being agreed by such country, with all others, that all shall have a free right of navigation or way over such waters, for harmless passage, and some other rights.

"If the latter view be correct, the adjacent country has the three miles as its property, — as under its dominion and sovereignty: if so, those three miles are its territorial waters, subject to the right of property, dominion,

and sovereignty. These are all the rights, and the same rights, which a nation has, or can have, over its land territory. If, then, such be its rights over the three miles of sea, that sea is as much part of its country or territory as its land."

Probably, little practical importance will attach in the future to the diversity of opinion developed in this discussion. If the power to legislate over the three-mile zone, as a part of its territorial dominion, should be exercised by any State or nation, it seems unlikely that any serious objection or complaint will be made by any other power. Very great advantages, and rare and trifling inconveniences, seem to us likely to result from treating the three-mile belt as a part of the territory of the adjacent State, to the same extent as harbors and small bays are now so treated, by universal consent. And we perceive no inconsistency in principle, or practical difficulty, in holding that this territorial sovereignty is subject to the right or easement of navigation over the littoral waters to be enjoyed by all the world except alien enemies. Nor would it be impracticable to adopt the rule that foreign vessels, while enjoying this right of peaceful passage over such territorial waters, should be exempt from the municipal laws of the country as to all acts done on the vessels, which inflict no injury upon persons not on board. By the law of France, an immunity from criminal jurisdiction exists to this extent as to crimes committed upon foreign vessels in French harbors; the government choosing to forego the exercise of its authority over the foreign vessel and crew, except when they disturb the peace and good order of the port. Opinion of Sir R. Phillimore.

In consequence of the case of the *Franconia*, "a territorial waters jurisdiction bill" was introduced in the House of Commons, which came up for discussion, April 18, 1877. In the course of the debate, the necessity of some legislation seemed to be universally admitted. The Attorney-General conceded that two propositions were established:—

"*First*, That a certain belt or zone of water round the coast was territorial water, and formed part of Her Majesty's dominions. *Secondly*, That that belt or zone of water, being part of the territory of Her Majesty, Parliament had a right, by legislation, to give the courts of the country jurisdiction over it. It was abundantly clear that it was the recognized law of nations, that there was a belt of ocean which really and truly formed part of the State it adjoined, although some doubt was expressed as to the

width of that belt. That belt of ocean was subject to the easement of the right of free passage over it by the ships of every nation of the world; but, subject to that easement, it formed part of the territory of the country whose shores it washed. If that were so, then it was equally clear that Parliament had the right, by enactment, to give the courts of this country jurisdiction over it."

The bill proposed was withdrawn by its mover, Mr. Gorst, on the ground that the matter ought to be intrusted to the government, after many assurances that the real urgency of the subject was fully recognized by the ministry; but that its difficulty, delicacy, and intricacy required further investigation and deliberation.

In this situation, we leave the English aspect of this question, and turn to examine briefly its condition under the legislative and judicial decisions of our own country. We have already quoted the Massachusetts statute of 1859, which declares that "the territorial limits of the Commonwealth extend one marine league from its sea shore, at low-water mark." Previously, in 1855, the right to regulate the time and manner of taking fish in the sea had been affirmed by the highest court of the Commonwealth. In passing upon the validity of a statute which forbade seining fish within one mile from the shores of Nantucket and certain smaller islands, Chief Justice Shaw said:—

"Being within a mile of the shore puts it beyond doubt that it was within the territorial limit of the State, although there might in many cases be some difficulty in ascertaining precisely where that limit is. We suppose the rule to be, that these limits extend a marine league, or three geographical miles, from the shore; and, in ascertaining the line of the shore, this limit does not follow each narrow inlet or arm of the sea; but, when the inlet is so narrow that persons and objects can be discerned across it by the naked eye, the line of territorial jurisdiction stretches across from one headland to the other of such inlet." *Dunham v. Lamphere*, 3 Gray, 270.

In the Supreme Court of the United States, it was decided, as early as 1818, in a judgment delivered by Marshall, C. J., "that the jurisdiction of a State is coextensive with its territory,—coextensive with its legislative power; but that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union. Con-

gress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory as a portion of sovereignty not yet given away." *United States v. Bevans*, 3 Wheat. 386.

In a later case, the same court declared, "Whatever risk below low-water mark is the subject of exclusive propriety and ownership belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the Declaration of Independence. But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyments of certain public rights; among which is the common liberty of taking fish, as well shell-fish as floating fish. The State holds the propriety of this soil for the conservation of the public rights thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held. It has been exercised by many of the States." Whether the liberty of taking oysters belonged exclusively to the citizens of Maryland, or to them in common with all the citizens of the United States, was left undecided; as also the question whether the national government, by treaty or act of Congress, could grant to foreigners the right to participate therein. *Smith v. Maryland*, 18 How. 71. But a vessel owned by a citizen of Pennsylvania, and duly enrolled and licensed to be employed in the coasting trade and fisheries, was adjudged to have been lawfully forfeited by a county court of Maryland for violating a statute of that State.

Some of the questions thus left undetermined have been adjudicated before the same tribunal, as recently as in May, 1877. In *McCready in error v. Virginia*, the entire court has held that a State can lawfully prohibit the inhabitants of another State from participating in its fisheries within tide-waters; that the ownership of the bed of the sea, the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running, is vested in the respective States within the jurisdiction of

which these waters are, as a property right, subject to the paramount right of navigation, the regulation of which in respect to foreign and inter-state commerce has been granted to the United States ; but that there has been no such grant of power over the fisheries which remain under the exclusive control of the State. The soil covered by water is as much a part of the public domain as the dry land, and is equally within the exclusive control of State legislation.

Neither of these decisions, however, determines the extent of the territorial jurisdiction of the States of the Union, either off the coast of the sea or within bays and gulfs between headlands. It is tolerably safe to assert that there is no just claim to extend territorial sovereignty beyond a marine league from the shore, except in bays the headlands of which are not more than six miles apart. To this conclusion all the reasoning of all the judges in the case of the *Franconia* strongly tends ; and it accords with the vast preponderance of such authority as can be collected from treaties, diplomatic discussions, and the writings of authors on international law. The *consensus* of jurists and the common consent of civilized nations have apparently settled this limit beyond reasonable controversy. Should any government at the present day assume sovereignty over a more extensive portion of the sea, either by way of general jurisdiction or control of the fisheries, or for any other purposes, its pretensions would be likely to be rejected and resisted by all other civilized nations.

DWIGHT FOSTER.

## PRIMITIVE NOTIONS IN MODERN LAW.

## No. II.

THE object of the following investigation is to prove the historical truth of a general result, arrived at analytically in the pages of this *Review* five years ago.<sup>1</sup> It shall be stated in a few words. All special rights are legal consequences of a special group of facts. The law determines what facts must co-exist for special consequences to follow, as well as what the consequences shall be. Thus the courts say, that, for a binding contract, there must be not only a promise, but a consideration and so forth. Then the legislature adds, that, in contracts of certain sorts, there must also be a writing. A party is entitled to any given right in the first instance, because all the requisite facts are true of him. But it frequently happens, especially in modern law, that a person acquires the special right, although the facts upon which it is primarily founded are not true of him, or are true only in part. In this way not only has the sphere of alienability been extended, but the peculiar consequences attached to privity of title have been introduced into the law. How does this happen? How can a man who has not used a way for twenty years acquire a right by prescription? How can a man sue or be sued on a contract to which he was not a party? The article referred to furnished further examples, and the answer there given was that in such cases there is a fictitious identification of distinct persons for the purpose of transferring or completing the right. We have now to consider what light history will throw on the same question, and for that purpose it will be well to start with the test case.

If a man, who has used a way over his neighbor's land to his own for ten years, sells his estate, and the buyer goes on with the use for ten years more, the buyer gets the same advantages which he would have gained by using the way himself for the whole twenty years. In other words, a buyer can add the seller's time of adverse user to his own, for the purpose of making out an enjoy-

<sup>1</sup> 7 Am. Law Rev. 46.



ment long enough to give him a right by prescription. What is the legal reason for this rule? Or, since the law so decides, why is an opposite rule laid down for a disseisor?

No need seems to have been generally felt of any other explanation than the spontaneous action of intelligence, irrespective of special conditions. Bearing in mind, however, that the question is not how men came to desire the advantage in question, but by what reasoning the law brought it to pass, an attempt will be made to show that the rule as to the joinder of times between buyer and seller grew out of an analogy which, after considerably affecting the Roman law, has had a still wider influence upon our own; which has, indeed, become one of those fundamental assumptions which it is the business of the jurist to mark and to explain. Some readers of this *Review* will be prepared to find the analogy sought in the relation of heir to ancestor.

For the purposes of the law, the heir was feigned to be the same person as the ancestor, not by an arbitrary invention, but on grounds which have long been understood. This fiction of identity was used by the prætors and jurisconsults to cover the fact that there had been a change, and to account for the heir's assuming rights and obligations which he could not assume in his own character. The fiction was so convenient that it was extended by another. The blood relations to whom the prætor gave the benefits of the inheritance, although they were not heirs, and could not be admitted to the succession according to the strictness of the *jus civile*,<sup>1</sup> were allowed by him to sue for property or debts belonging to the inheritance, on the fiction that they were the civil heirs. The *bonorum possessor*, we are told by Gaius, "*ficto se herede agit*."<sup>2</sup> "*Heredis loco constituuntur*," in the language of Ulpian.<sup>3</sup> So the *fidei commissarius*, who was a prætorian successor,<sup>4</sup> "*in similitudinem heredis consistit*."<sup>5</sup>

One of the early forms of instituting an heir, it will be remembered, was a sale of the *familia*.<sup>6</sup> This sale of the *universitas* was extended beyond the case of inheritance to that of bankruptcy, when it was desired to put the bankrupt's property into the hands of a trustee for distribution. The "*emptor bonorum*," as he was

<sup>1</sup> D. 88, 8, 1, pr.

<sup>2</sup> IV. § 84.

<sup>3</sup> Fragm. xxviii. § 12; D. 37, 1, 2.

<sup>4</sup> D. 41, 4, 2, § 19; D. 10, 2, 24.

<sup>5</sup> Nov. 1, 1, § 1. Cf. Just. Inst. 2, 24, pr.; and then Gaius, ii. §§ 251, 252.

<sup>6</sup> Gaius, ii. § 102 *et seq.*; cf. ib. §§ 252, 35.

called, also "*ficto se herede agit*." <sup>1</sup> Paulus says, broadly, "Hi, qui in universum jus succedunt, heredis loco habentur." <sup>2</sup>

The fiction, as such, could hardly be used with propriety, except to enlarge the sphere of universal successions. So far as it extended, however, the joinder of times which we are discussing followed as of course. There was no addition, legally speaking; but one continuous possession. It is not surprising, therefore, to find that Paulus, in accounting for such a joinder between a *legatarius* and his testator, uses the same explanation: "In re legata in accessione temporis quo testator possedit, legatarius quodammodo quasi heres est." <sup>3</sup> Yet a *legatarius* was not a universal successor, and for most purposes stood in marked contrast with those who took *per universitatem*. <sup>4</sup>

The express fiction of inheritance, it is fully admitted, stopped here. But it had made the notion familiar, that one man might have the advantage of a position filled by another, although not filled, or only partially filled, by himself; and it afforded an analogy which would justify such a conclusion in new cases. As we have seen, the analogy was applied in terms to a sale of the *universitas* for business purposes, and to at least one case of singular succession. The joinder of times between vendor and purchaser was an extension (probably a later extension) of the same principle. We may read the whole explanation of its appearance in a passage from Scævola (B. C. 30): "[Accessiones possessionum] plane tribuuntur his qui in locum aliorum succedunt sive ex contractu sive voluntate: heredibus enim et his, qui successorum loco habentur, datur accessio testatoris. Itaque si mihi vendideris servum utar accessione tua." <sup>5</sup> It will be noticed that the joinder of times is given to those "who *succeed to the place of another*, whether by contract or will." Ulpian cites a similar phrase from a jurisconsult of the time of the Antonines: "Ab eo in cujus locum hereditate vel emptione aliove quo jure successi." <sup>6</sup> *Succedere in locum aliorum*, like *sustinere personam*, is an expression of the Roman lawyers for those continuations of one man's legal position by another, of which the type was the succession of heir to ancestor.

<sup>1</sup> Gaius, iv. § 85. This form of action is said to have been confined to the *venditio bonorum mortui*. Scheurl, *Lehrb. der Inst.* § 218, p. 407, 6th ed.

<sup>2</sup> D. 50, 17, 128.

<sup>3</sup> D. 41, 3, 14, § 1.

<sup>4</sup> D. 41, 1, 62; D. 43, 3, 1, § 6; Gaius, ii. § 97; Just. Inst. 2, 10, § 11.

<sup>5</sup> D. 44, 3, 14, § 1.

<sup>6</sup> D. 43, 19, 3, § 2.

Thus Gaius, in the passage already cited as to the *bonorum possessor*, speaks of his succeeding *in locum defuncti prætorio jure, et non legitimo*; the *successio in locum defuncti* being the general formula applicable to all who came in by either law. *Succedere*, alone, is used in the sense of "inherit;"<sup>1</sup> and *successio*, in that of "inheritance."<sup>2</sup> The succession was the inheritance; and it is believed that scarcely any instance will be found in the Roman sources where succession does not carry that analogy with it, and indicate the partial assumption, at least, of a *persona* formerly sustained by another. But the succession which admits a joinder of times is not confined to hereditary succession. It may be *ex contractu* or *emptione* as well as *voluntate*; and the jurists often mention antithetically successions *in universum jus*, and those *in rem*, or *in rei tantum dominium*. "In locum successisse accipimus sive in universitatem sive in rem sit successum."<sup>3</sup> Savigny very nearly expressed the truth, although he does not seem to have had any historical explanation present to his mind. He says, somewhat too broadly, "Every *accessio*, for whatever purpose, presupposes nothing else than a relation of juridical succession between the previous and present possessor. For succession does not apply to possession by itself."<sup>4</sup>

Another expression of Ulpian's gives a further confirmation to the present argument. He speaks of the benefit of joinder as derived from the *persona* of the grantor. "Cum quis utitur adminiculo ex persona auctoris, uti debet cum sua causa suisque vitiis: denique addimus in accessione de vi et clam et precario venditoris." . . . § 11. "Sed et is, cui res donata est, accessione utetur ex persona ejus qui donavit."<sup>5</sup>

Justinian's Institutes, after stating that *diutina possessio*, begun by the deceased, is continued (*continuatur*) in favor of the heir and *bonorum possessor*, proceed, in the following section, to mention the joinder between buyer and seller as of later introduction. "Inter venditorem quoque et emptorem conjungi tempora divi Severus

<sup>1</sup> D. 50, 4, 1, § 4; cf. Cic. de Off. 3, 19, 76.

<sup>2</sup> C. 2, 3, 21; C. 6, 16, 2; cf. D. 38, 8, 1, pr.

<sup>3</sup> Ulp. D. 43, 3, 1, § 13; cf. D. 21, 3, 3, § 1; D. 12, 2, 7 & 8; D. 39, 2, 24, § 1.

<sup>4</sup> Recht des Besitzes, § 11, 7th ed. p. 184, n. 1, Eng. tr. 124 n. 1; cf. 7 Am. Law Rev. 49, 59, 64, 65.

<sup>5</sup> D. 41, 2, 13, §§ 1, 11. Other cases put by Ulpian stand on a different fiction. After the termination of a *precarium*, for instance, *fungitur fundus nunquam fuisse possessus ab ipso detentore*. Gothofred, note 14 (Elz. ed.).

et Antoninus rescripserunt.”<sup>1</sup> We have already seen that the general notion of the joinder of times was familiar to Scævola, so that we can only attribute its extension to Antoninus. The language of Justinian may refer to the rescript mentioned by Marcian, by which “cavetur ut in rebus mobilibus locus sit præscriptioni diutinæ possessionis,”<sup>2</sup> naturally extending the doctrine to that new case. A slight difference will be noticed between the words *continuatur* and *conjungi*. This may have been accidental; but, undoubtedly, there was a wide distinction between succession by inheritance and succession by purchase; and we need not hesitate to admit that the juriconsults were hardly conscious that they applied to the latter a way of thinking which they derived from the former relation. Paulus, in the very passage in which he accounts for the joinder of times between *testator* and *legatarius*, on the ground that the latter is in a certain sense *quasi* heir, lays down the law as to vendor and purchaser, without suggesting a similar explanation. The purchaser does not seem to have been so fully identified with the seller as the heir with the ancestor, even with reference to his rights over the thing sold. “Plenus est jus successionis quam emptionis.”<sup>3</sup> Paulus says that a purchaser of a thing which he knows to belong to another cannot get a title by usucaption, although the vendor had begun to do so. On the other hand, the heir of a *bona fide* purchaser may gain a right under the same circumstances.<sup>4</sup> But Ulpian, in a passage to be cited presently, uses language which has been construed to put a purchaser on an equal footing with the heir.<sup>5</sup>

The way of thinking, however, which led to the joinder of times, is equally visible in other cases. Thus, the time during which a former owner did not use an easement *imputatur ei qui in ejus loco successit*.<sup>6</sup> So the *exceptio rei venditæ et traditæ*, the defence that the plaintiff had sold and delivered the thing in controversy to the defendant, was available not only to the purchaser, but to his heirs and a second purchaser, *etsi res ei non fuerit tradita*; and also against the successors of the vendor, *sive in universum jus sive in eam dumtaxat rem successerint*.<sup>7</sup> So

<sup>1</sup> Inst. 2, 6, § 18.

<sup>2</sup> D. 44, 3, 9.

<sup>3</sup> D. 41, 2, 18, § 4.

<sup>4</sup> D. 41, 4, 2, §§ 17, 19; cf. D. 41, 2, 18, § 18.

<sup>5</sup> D. 50, 17, 156, § 2; but cf. D. 41, 2, 18, § 18.

<sup>6</sup> Paulus, D. 8, 6, 18, § 1. This seems to be written of a rural servitude (*aqua*), which was lost by mere disuse, without adverse user by the servient owner.

<sup>7</sup> Hermogenianus, D. 21, 3, 3.

if one uses a way wrongfully as against my *auctor*, Ulpian says, "Recte a me via uti prohibetur et interdictum ei inutile est, quia a me videtur vi vel clam vel precario possidere qui ab auctore meo vitiose possidet. Nam et Pedius scribit, si vi aut clam aut precario ab eo sit usus, in cuius locum hereditate vel emptione aliove quo jure successi, idem esse dicendum: cum enim successerit quis in locum eorum, æquum non est, nos noceri hoc, quod adversus eum non nocuit, in cuius locum successimus."<sup>1</sup>

So after the formal oath of a party to an action, Ulpian says, the prætor "de eo quod juratum est pollicetur se actionem non daturum neque in eum qui juravit neque in eos qui in locum ejus cui jusjurandum delatum est succedunt;" and the sentence is continued from Paulus, "etiamsi in rem successerint."<sup>2</sup> So in a case of contract: "Adicitur in hac stipulatione et heredum nomen vel successorum eorumque ad quos ea res pertinet. Successores autem non solum qui in universa bona succedunt, sed et hi, qui in rei tantum dominium successerint, his verbis continentur:"<sup>3</sup> a passage which is cited by Gothofred as authority for the proposition, that an action lay against the singular successor.<sup>4</sup> So, "Pactum conventum cum venditore factum si in rem constituatur, secundum plurimum sententiam et emptori prodest, . . . Secundum Sabini autem sententiam etiamsi in personam conceptum est, et in emptorem valet: qui hoc esse existimat et si per donationem successio facta sit."<sup>5</sup> To these special cases may be added general expressions which show, that, for most purposes, whether of action or defence, the position of the buyer was the same as that of the seller, to whose place he had succeeded.<sup>6</sup>

It would seem that in the Roman law, as in ours, there was no succession between a wrongful possessor and the person dis-

<sup>1</sup> D. 43, 19, 3, § 2. The variation *actore*, argued for by Savigny, is condemned by Mommsen, in his edition of the Digest. It seems rightly.

<sup>2</sup> D. 12, 2, 7 & 8.

<sup>3</sup> Ulp. D. 39, 2, 24, § 1; cf. D. 8, 5, 7.

<sup>4</sup> D. 39, 2, 17, § 3, n. 79, Elz. ed.

<sup>5</sup> Paulus, D. 2, 14, 17, § 5.

<sup>6</sup> "Cum quis in alii locum successerit non est æquum ei nocere hoc, quod adversus eum non nocuit in cuius locum successit: Plerumque emptoris eadem causa esse debet circa petendum ac defendendum, quæ fuit auctoris." Ulp. D. 50, 17, 156, §§ 2, 3. "Qui in jus dominiumve alterius succedit, jure ejus uti debet." Paulus, D. 50, 17, 177. "Non debeo melioris condicionis esse, quam auctor meus, a quo jus in me transit." Paulus, D. 50, 17, 175, § 1. "Quod ipsis qui contraxerunt obstat, et successoribus eorum obstat." Ulp. D. 50, 17, 143. "Nemo plus juris ad alium transferre potest, quam ipse haberet." Ulp. D. 50, 17, 54.

possessed. “Ne vitiosæ quidem possessioni ulla potest accedere.”<sup>1</sup> The ancient possibility of gaining the inheritance by usucaption had been forgotten in Ulpian’s time; and, without the element of consent, there was no likeness to be laid hold of.

It will now be interesting to search the German sources. It is not however proposed to argue the vexed question, whether the German heir was a universal or singular successor; or how far, if at all, buyer and seller were originally identified. The analogy between purchaser and heir seems to have been used in the folk laws, — but, mainly at least, for a different purpose: this was to enlarge the sphere of alienability. The transfer of property, which at first could not be given outside the family, was worked out through the form of making the grantee an heir. *Heres*, as Beseler and others have remarked,<sup>2</sup> from meaning a successor to the property of a person deceased, was extended to a donee *mortis causa*, — and, even more broadly, to a grantee in general. *Hereditare* was used in like manner for the transfer of land. “Hévin fait observer que nos anciens disaient *hériter* pour acquérir, *héritier* pour acquéreur, *déshériter* pour aliéner,”<sup>3</sup> &c. When the Roman identification of heir with ancestor became a part of our law, a more limited identification of buyer with seller naturally followed.

The Frankish *adfathamire* was a transfer *inter vivos* of the whole or any part of a man’s property (“quantum dare voluerit — nec minus nec majus nisi quantum ei creditum est”),<sup>4</sup> accompanied by an immediate change of possession, through the mediation of a trustee, who within twelve months handed the property over to the beneficiaries. The word applied to the latter is significant, — *heredes*; “quos heredes appellavit.” The beneficiaries seem to have been freely chosen (*appellavit*), and yet to have taken under the form or at least the name of *heredes* of the property in question. It is not necessary to suppose that a personal relation was thereby established, as by the Roman adoption. It is enough that the word *heres*, which must have meant at first one who took by descent, was extended to one who took by purchase.<sup>5</sup> The later Ripuarian law is even more explicit: “Omnem facultatem suam . . . seu cuicunque libet de proximis vel extraneis, adoptare

<sup>1</sup> D. 41, 2, 18, § 18.

<sup>2</sup> Erbverträge, i. 15 *et seq.*

<sup>3</sup> Laferrière, Hist. du Droit Franç. iv. 500.

<sup>4</sup> Lex Sal. (Merkel) cap. xlvj.

<sup>5</sup> Cf. Beseler, Erbverträge, i. 101, 102, 105.

in hereditatem vel in adfatimi vel per scripturarum seriem seu per traditionem.”<sup>1</sup> So Capp. Rib., § 7: “Qui filios non habuerit et alium quemlibet heredem facere sibi voluerit, coram rege . . . traditionem faciat.”

So in the Lombard Thinx, the donee is not only spoken of as *heres*, but he is made liable for the debts of the donor on receiving the latter's property after his death;<sup>2</sup> just as heirs, properly so called, would have been.<sup>3</sup> This, no doubt, was due to Roman influence.

The *chrenecruda* of the Salic Law should not be overlooked in this connection; for that also seems to carry with it a suggestion of inheritance. At a time when land is supposed not to have become available for payment of debts, the man who could not pay the *wergeld* was allowed to formally transfer his house lot, and with it the liability. But the transfer must be made to the next of kin, and the order of nearness is stated with some care.<sup>4</sup>

A different but striking illustration of the general principle, if we may trust a translation where it seems impossible that the translator should have gone wrong, is to be found in the story of Burnt Njal, — an Icelandic saga, which gives us a living picture of a society hardly more advanced than the Salian Franks, as we see them in the *Lex Salica*. A lawsuit is transferred by the proper plaintiff to another more versed in the laws, and better able to carry it on, — in fact, to an attorney. But a lawsuit was at that time the alternative of a feud, and both were the peculiar affair of the family concerned. This is not forgotten when the lawsuit is to be pleaded by one who was not in fact the party in interest. Mord is to take upon himself Thorgeir's suit against Flosi, for killing Helgi; and he takes witness as follows: “Then Mord took Thorgeir by the hand and named two witnesses to bear witness, ‘that Thorgeir Thorir's son hands me over a suit for manslaughter against Flosi Thord's son, to plead it for the slaying of Helgi Njal's son, with all those proofs which have to follow the suit. Thou handest over' to me this suit to plead and to settle, and to enjoy all rights in it, *as though I were the rightful*

<sup>1</sup> L. Rib., cap. L. (al. XLVIII.)

<sup>2</sup> Ed. Roth. cap. 174, 157.

<sup>3</sup> Ed. Roth. cap. 369, 388; Liutpr. iii. 16 (al. 2); vi. 155 (al. 102); cf. Beseler, Erbverträge, i. 108 *et seq.*; esp. 116–118.

<sup>4</sup> Lex Sal. (Merkel) LVIII.; Sohm Fränk. R. & G.verf. i. 117.

*next of kin.* Thou handest it over to me by law; and I take it from thee by law.'"<sup>1</sup> Afterwards, these witnesses come before the court, and bear witness to the transfer in like words: ". . . he handed over to him then this suit, with all the proofs and proceedings which belonged to the suit, he handed it over to him to plead and to settle, and to make use of all rights, as though he were the rightful next of kin. Thorgeir handed it over lawfully, and Mord took it lawfully."<sup>2</sup> The suit went on, notwithstanding the change of hands, as if the next of kin were plaintiff. This is shown by a further step in the proceedings. The defendant challenges two of the court, on the ground of their connection with Mord, the transferee, by blood and by baptism. But Mord replies that this is no good challenge; for "he challenged them not for their kinship to the true plaintiff, the next of kin, but for their kinship to him who pleaded the suit."<sup>3</sup> And the other side had to admit that the law was so.

It is familiar that the land first withdrawn from the early communities was the family curtilage, and that this originally devolved strictly within the limits of the family. Here again, at least in England, freedom of alienation seems to have been expanded by means of a latitude of choice at first confined to heirs among the kindred, and then extended beyond them. LL. Alfred, 41, supposes a grant which does not permit the land to pass outside the family.<sup>4</sup> In one of the earliest charters in the Codex (A. D. 679), the language is, "*Sicuti tibi donata est ita tene et posteris tui.*"<sup>5</sup> One of Uhtred, a century later (767), reads, "*Quam is semper possideat et post se cui voluerit heredum relinquat.*"<sup>6</sup> So Offa, in 779, "*Ut se vivente habe . . . deat. et post se suæ propinquitatis homini cui ipse vo . . . possidendum libera utens potestate relinquat.*"<sup>7</sup> A charter of Æthilbald (736) goes a step further: "*Ita ut quamdiu vixerit potestatem habeat tenendi ac possidendi cuicumque voluerit vel eo vivo vel certe post obitum*

<sup>1</sup> Burnt Njal, ii. 210; cf. ib. 223.

<sup>2</sup> Ib. 246.

<sup>3</sup> Ib. 248, 250.

<sup>4</sup> Cf. 11 Am. Law Rev. 329.

<sup>5</sup> Kemble, Cod. Dip. i. 21, No. xvi.

<sup>6</sup> Ib. i. 144, cxvii. *Cuilibet heredi voluerit relinquat* is very common in the later charters. Kemble, v. 155, mclxxxii.; id. vi. 1, mccxviii.; ib. 81, mcccxxx.; ib. 88, mcccxxxiv.; and *passim*. This may be broader than *cui voluerit heredum*.

<sup>7</sup> Ib. i. 164, 165, cxxxvii.



suum *relinquendi*.”<sup>1</sup> So Cuthred of Kent (805): “*Cuicumque hominum voluerit in æternam libertatem derelinquat* ;”<sup>2</sup> or, in still larger terms, “*Ut habeat libertatem commutandi vel donandi in vita sua et post ejus obitum teneat facultatem relinquendi cui-cumque volueris*.”<sup>3</sup> So Wiglaf of Mercia (Aug. 28, 881): “*Seu vendendum aut commutandum ꝛ cuicumque ei herede placuerit derelinquendum*.”<sup>4</sup> Some of these phrases may be compared with the *quos heredes appellavit* of the Salic Law, and with such language as the following in a Norman charter: “*W. et heredibus suis, videlicet quos heredes constituerit*.”<sup>5</sup>

Without delaying longer amid the obscurities of early German law, we strike again into the descending stream of Roman thought in the work of Bracton. This writer will be found to go beyond the Romans, in his use of their analogy of the inheritance, and will be found to use it for similar juridical purposes. On the question, Who shall have the benefit of a warranty? he says,<sup>6</sup> “*Item augere potest donationem et facere alios quasi heredes, licet re vera heredes non sunt, ut si dicat in donatione, habendum et tenendum tali et heredibus suis, vel cui terram illam dare vel assignare voluerit: et ego et heredes mei warrantizabimus eidem tali et heredibus suis, vel cui terram illam dare voluerit vel assignare, et eorum heredibus contra omnes gentes. In quo casu, si donatorius terram illam dederit vel assignaverit, si donatorius et heredes sui defecerint, donator et heredes sui incipiunt esse loco donatorii et heredum suorum, et pro herede donatorii erunt, quoad warrantizandum assignatis et heredibus eorum per clausulam contentam in charta primi donatoris, quod quidem non esset, nisi mentio fieret de assignatis in prima donatione. Sed quamdiu primus donatorius superstes fuerit vel ejus heredes, ipsi tenentur ad warrantiam et non primus donator.*”

Here we see, in the first place, that to entitle the assign to vouch the first grantor to warranty, assigns must be mentioned in the grant and the covenant. If mentioned, they are thereby made *quasi* heirs of the first grantee. And it follows, of course, that they succeed to the benefit of the warranty, after the manner of true heirs, upon a failure of the first grantee's blood. While the assign remains only a sub-tenant, he is not in immediate relation with the

<sup>1</sup> Cod. Dip. i. 96, LXXX.; cf. id. v. 58, XXIV.

<sup>2</sup> Ib. i. 232, cxc.

<sup>3</sup> Ib. i. 233, 234, cxcl.; cf. id. v. 70, MXXXI.

<sup>4</sup> Ib. i. 294, CCXXVII.

<sup>5</sup> Surtees Soc. Pub. 1864, ii. 88.

<sup>6</sup> Fol. 17b.

original grantor, and therefore cannot be said to sustain any part of the mesne grantee's *persona*. Bracton is not content with disposing of the benefit of the covenant in this way: the grantor is represented in like manner as taking the burden *pro herede*. This would be pushing the conception too far, if *pro herede* is used exactly; and Bracton always distinguishes between *pro herede* and *quasi heres*. The error seems to have come from confounding this case, where the grantor is clearly held upon his own warranty, with others where he has to make good that of his grantee by reason of standing *loco heredis*; as, for instance, upon an escheat.<sup>1</sup>

In another place, we read as follows: "Et quod de heredibus dicitur, idem dici poterit de assignatis et de illis qui sunt loco illorum heredum, sicut sunt capitales domini qui tenentibus suis quasi succedunt, vel propter aliquem defectum, vel propter aliquod delictum sicut de eschætis dominorum. Et quod assignatis fieri debet warrantia per modum donationis, probatur in itinere W. de Ralegh in Com. Warr. circa finem rotuli, et hoc maxime si primus dominus capitalis et primus feoffator ceperit homagium et servitium assignati." <sup>2</sup>

Here, again, we are told that the lord is bound *loco heredis* by the warranty of his tenant in case of escheat and the like, and that the tenant's assign has the benefit of the lord's warranty, like an heir, by the form of the gift, especially if the personal relation of homage has been established between assign and lord. If there were a mere subinfeudation, the assign did not sustain any part of his grantor's *persona*, and the latter would be the proper person to vouch the chief lord to warranty. But when he assumed his grantor's relation to the chief lord, it seems possible that it may not have mattered for this purpose whether it was brought about by a failure of blood of the mesne holder, as supposed in the passage first cited, or by a feoffment *tenendum* of the chief lord direct.<sup>3</sup>

One more quotation may be made, to show that Bracton's use of language was not accidental: "Et notandum quod heredum quidam sunt veri heredes et quidam sunt quasi heredes, in loco heredum, et pro heredibus habentur, veri heredes ex causa successionis, quasi heredes, et loco heredum, vel pro heredibus, per modum donationis: sicut sunt assignati, vel loco heredum sicut domini capitales, quibus revertitur hereditas propter defectum vel

<sup>1</sup> Fol. 23 *ad fin.* 23 b.<sup>2</sup> Fol. 380 b, 381.<sup>3</sup> Fol. 81. But see p. 660, n. 1.

propter delictum, sicut eschæta propter defectum heredis cum heredes deficiant in linea descendente: propter delictum, i. propter feloniam ubi impeditur descensus, licet heredes exstiterint aut parentes. Item propter modum donationis," &c., as, in case of an estate tail.<sup>1</sup> The persons analogous to heirs *per modum donationis* are set against true heirs *ex causa successionis*. The examples follow the same order as the general words: *assignati* corresponds to *quasi heredes*; *domini capitales*, to *loco heredum*; to which are added tenants in tail, as heirs by the form of the gift.

At this point, a word of caution should be interposed. Bracton's argument in favor of free alienation bears on a point to be developed further on. The question in these passages has not been to make alienation possible; but, as has been said, how to extend the benefit and burden of a warranty to parties who never in fact contracted together.

That the mention of assigns was essential for this and kindred purposes in an ordinary conveyance, is shown not only by Bracton but also by a case in the *Abbreviatio Placitorum*.<sup>2</sup> The record (33 Ed. 1) discloses that William Sayer and Margaret his wife enfeoffed the defendant, Geoffrey of Hertepole, of the manor of Brereton, and levied a fine thereof, reserving to said William and Margaret, and the heirs of said William, a certain annual rent. William and Margaret afterwards gave the rent by fine to Ralph, the son of William, and Ralph sued Geoffrey for the same. Geoffrey pleads that as in the fine, to which he was a party, there was no mention of *assigns*, but only of heirs, he is not bound to attorn to Ralph. Replication: That the word "assigns" is not a word used in fines. This seems to show, that in ordinary conveyances the word was regarded as necessary to carry the benefit of the obligation to a stranger. Whether the exception alleged existed in case of fines, which, it will be remembered, were in form judicial proceedings, is not decided. It will be noticed, further, that it is not a question arising after attornment, but raises the issue whether the defendant was bound to attorn.

Nearly two centuries later, the Year Books<sup>3</sup> furnish us another case, which indicates that Bracton's bold fictions had somewhat

<sup>1</sup> Fol. 87.

<sup>2</sup> Page 808, 2d col. ad f., Rot. 48; cf. Fleta, 197, § 6; Britton (Nich.), i. 228, 233, 244, 255, 812; Y. B. 20 Ed. I. 282; Co. Lit. 884 b.

<sup>3</sup> 5 Henry VII. 18, pl. 12.

faded from remembrance, and yet that the same analogy or way of thinking from which he reasoned still served to justify similar conclusions. The case was debt for rent reserved upon a lease, brought by a devisee of the lessor. The land was alleged to be in London, and devisable by custom. Rede took exception for the defendant that debt does not lie without privity. Executors, he said, have debt because the law makes them privies; and the heir, if the reversion descends to him, because he is privy. But the grantee or devisee is not privy; nor does debt lie, if the reversion escheats to the lord. And a diversity was taken between the grant of his entire interest by the lessee and a grant by the lessor. But the court held that the action lay; for the reason that, when the reversion comes lawfully to one so that he shall have the rent with the reversion, in this case he shall have debt. For the law makes privity, as is agreed in case of executors, or of heir if the reversion had descended; and the *same principle applies (et eadem causa)* when the reversion is devised. The reversion is lawfully in the devisee, and so the law gives action; and so of grantee and lord in case of escheat.

The reader will remember what Paulus says of the *legatarius*.

The question propounded at the beginning of this article has now been answered by history in a way which confirms the results of analysis. So far as we have gone, we have found that wherever one party steps into the rights or obligations of another, without in turn filling the situation of fact of which those rights or obligations are the legal consequences, the explanation lies in a fictitious identification of the two individuals, which was in fact derived from the analogy of inheritance. This identification, which may be generalized under the term "successions," extends far beyond the domain of inheritance, and has greatly enlarged the sphere of alienation, as well as affected its consequences. It must, in fact, be recognized as one of the most fundamental as well as most difficult conceptions of the law.

But, although it would be more symmetrical if the above analysis exhausted the subject, another case will show that something still remains to be accounted for. It has been stated above, that a disseisor would not be allowed to join the time of his disseisee to his own. If the change of hands is wrongful, there is no room for the analogy just explained. But, suppose

a right of way had been already acquired before the disseisin, how would it be then? Would the disseisor have an action against a person, other than the rightful owner of the dominant estate, for obstructing the way? Very little authority has been found in the books of the common law; but it is believed that such an action would lie.<sup>1</sup> If this be so, it is irreconcilable with the principle thus far relied on; for there is no succession between disseisor and disseisee. Again, it cannot stand on the protection given to mere possession, as in the case of land. The decision would hardly turn on the question whether the disseisor had used the way, and an easement is an ideal creation of the law, incapable of proper possession, as has always been recognized.<sup>2</sup> It presupposes that somebody else is in possession of the servient land, and it cuts down the powers which he would naturally enjoy as such possessor but for the interference of the law. How comes it, then, that one who neither has possession in fact nor title, is so far favored? The answer is to be found not in reasoning, but in a failure to reason. In an earlier article,<sup>3</sup> the frame of mind with which we have to deal was shown in its theological stage, to borrow Comte's well-known phraseology, as when an axe was made the object of criminal process; and also in the metaphysical, where the language of personification alone survived, but survived to cause confusion in reasoning. The case put seems to be an illustration of the latter. Certainly, the dominant estate was never "erected into a legal person," either by conscious fiction or as a result of primitive beliefs. To suppose so, is to mistake both history and analysis. It could not sue or be sued, like a ship in the admiralty. And if the land had been systematically treated as capable of acquiring rights, or if the reason were merely long association between the enjoyment of the privilege and the land, the time of a disseisee might have been added to that of a wrongful occupant, on the ground that the land, and not this or that individual, was gaining the easement; which is believed never to have been the law. But the language of the law of easements was built up out of similes drawn from legal persons, at a time when the *noxæ deditio* was still

<sup>1</sup> *Chudleigh's Case*, 1 Co. Rep. 120 a, 122 b; *Ferguson v. Witsell*, 5 Rich. (So. Car.) 280; Austin Jurisp. Lect. L. pp. 845, 847, 8d ed.; D. 8, 6, 12.

<sup>2</sup> D. 41, 2, 8, pr.; D. 41, 3, 4, § 26 (27); Savigny, R. d. Besitzes, § 12. See, however, L. R. 2 Ex. 1, 10.

<sup>3</sup> 10 Am. Law Rev. 422.

familiar; and then, as often happens, language reacted on thought, so that conclusions were drawn as to the rights themselves from the terms in which they happened to be expressed. When one estate was said to be enslaved to another, or a right of way to be a quality or incident of a neighboring piece of land, men's minds were not alert to see that these were but so many personifying metaphors, which explained nothing unless the figure of speech was true. Austin blames Rogron for drawing the negative nature of servitudes from the rule, "*prædium non persona servit*;" but the jurists from whom we have inherited our law of easements were contented with no better reasoning. Papinian himself wrote, "*Quoniam non personæ, sed prædia deberent, neque adquiri libertas neque remitti servitus per partem poterit.*"<sup>1</sup> Celsus thus decides the case above proposed: "Even if possession of a dominant estate is acquired by forcibly ejecting the owner, the way will be retained; since the estate is possessed in such quality and condition as it is when taken." "*Qui fundum alienum bona fide emit, itinere quod ei fundo debetur usus est: retinetur id jus itineris: atque etiam, si precario aut vi dejecto domino possidet: fundus enim qualiter se habens ita, cum in suo habitu possessus est, jus non deperit, neque refert, juste nec ne possideat qui talem eum possidet.*"<sup>2</sup> Gothofred's note tersely adds, that there are two such conditions,—slavery and freedom; and his antithesis is as old as Cicero.<sup>3</sup>

So, in another passage, Celsus asks, what else are the rights attaching to land but qualities of that land.<sup>4</sup> So Justinian's Institutes speak of servitudes *quæ ædificiis inhærent*.<sup>5</sup> So the use of a way for the purpose of gaining the protection of the interdict, or of keeping the right, might be by others than servants or agents of the owner, "*nam satis est fundi nomine itum esse.*"<sup>6</sup> So Paulus says, that if a servient estate, or that to which the servitude is due, should be confiscated, the servitude remains in either case, since either would be taken *cum sua condicione*; <sup>7</sup> and again, "*Etiam si corporibus accedunt.*"<sup>8</sup> "And so," Gothofred adds, "rights may belong to inanimate things." So a sale of the

<sup>1</sup> D. 8, 3, 84, pr.

<sup>2</sup> Elz. ed. n. 51, ad l. cit.; Cicero de L. Agr. 3, 2, 9.

<sup>3</sup> D. 50, 16, 86; cf. Ulp. D. 41, 1, 20, § 1.

<sup>4</sup> D. 8, 6, 6, pr.; cf. D. 43, 19, 1, § 7; ib. 3, § 4.

<sup>5</sup> D. 8, 1, 14; cf. Elz. ed. n. 58, "Et sic jura . . . accessiones esse possunt corporum."

<sup>6</sup> D. 8, 6, 12.

<sup>7</sup> Inst. 2, 3, § 1.

<sup>8</sup> D. 8, 3, 23, § 2.

dominant estate carries existing easements, not because the buyer succeeds to the place of the seller, but *cum fundus fundo servit*.<sup>1</sup>

Similar language is familiar to modern ears; but it will be useful to turn for a moment to one early book. Bracton often repeats the phrases of the Roman law and the glossers. Thus, "Pertinent enim ad liberum tenementum jura sicut et corpora: . . . Jura autem sive libertates dici poterunt ratione tenementorum quibus debentur. Servitutes vero ratione tenementorum a quibus debentur. . . . prædiorum aliud liberum aliud servituti suppositum."<sup>2</sup> Et talis dici poterit constitutio qua domus domui, rus ruri, fundus fundo, tenementum tenemento subjungatur."<sup>3</sup> The writer is not aware that Bracton expressly decides whether easements pass with the dominant estate upon a disseisin. But the writ against the disseisor is for "tantum terræ *cum pertinentiis*."<sup>4</sup> And such statements as this: "Cum jura traditionem non patiantur, sed cum ipsa re cui insunt scilicet cum corpore transferantur, ille ad quem transferuntur statim cum corpus habuerit cui insunt jura illa quasi possidet,"<sup>5</sup> show that the Roman conception of rights inhering in a piece of land presented no intrinsic difficulties to his mind.

Some slight traces of vacillation, however, are to be found in Bracton, in consequence of the conflicting principles which he had admitted. On the one hand, the benefit of a warranty was confined to those who, by the act and consent of the grantee succeeded to his place. Without such consent, there was no succession, and only assigns came within the terms of the grant. On the other hand, if an easement inhered in the land, there was no need of succession, and a disseisor would have it as well as another. Which principle was to be applied to a grant of an easement to one, his heirs and assigns? If only a privy in title with the grantee could have it, the same principle would probably be applied to easements acquired by prescription; for no satisfactory distinction could be based on the manner of acquisition. But, as has been said, Bracton would undoubtedly have admitted that, in some cases, an easement would go with the land even to a disseisor; otherwise his usual language would be meaningless. Yet, if he granted any thing in this direction, logic required the application of the same rule to all prescriptive rights, including those to active

<sup>1</sup> D. 8, 4, 12; cf. D. 8, 5, 20, § 1; D. 41, 1, 20, § 1.

<sup>2</sup> Fol. 220 b.

<sup>3</sup> Fol. 221.

<sup>4</sup> Fol. 219, 219 b.

<sup>5</sup> Fol. 226 b.

services (such as fencing), which are more usually created by covenant; and it might even be asked, though not with conclusive force in the case of contract, Why should not a covenant inhere in the land, as well as any thing else? <sup>1</sup> We shall see the shadow of this doubt clouding the mind of the judges a little later. Bracton goes no further than an ambiguous phrase. He says, that, if an easement is given to one and his heirs or assigns, all such are allowed the use in succession, and all others are wholly excluded.<sup>2</sup> But it does not appear that he is thinking what the rights of a disseisor would be as against one not having a better title; and he immediately adds the usual statement, *pertinent de re corporali, ad rem corporalem, &c.*

It should be observed, further, that Bracton argues that it is no wrong to the lord for the tenant to alienate land held by free and perfect gift, on the precise ground that the *land* is bound and charged with the services, into whosoever hands it may come. The lord is said to have a fee in the homage and services; and therefore no entry upon the land, which does not disturb them, injures him.<sup>3</sup> It is obvious that this reasoning would apply to a disseisor of the tenant. It is the *tenementum* which *obligationem homagii inducit*.<sup>4</sup> The same thing is true of villein <sup>5</sup> and other feudal services.<sup>6</sup>

If evidence of a general tendency, in the early communities and manors, to impress a permanent character on particular parcels of land, or that services were due from or to their respective occupants simply by reason of their occupation, were necessary for the present argument, it would probably not be hard to find.<sup>7</sup> But there is no need of going into further details.

It is more important to observe, as has already been hinted, that the two competing conceptions of succession or privity on the one hand, and on the other that rights might inhere in a thing, necessarily crossed each other's path in the English law. The point of contact seems to have lain between prescriptive rights, and rights arising from contract. We cannot, however, adopt either the distinction between rights *in rem* and obligations, or that between grant and prescription, as the

<sup>1</sup> Cf. Co. Lit. 885 a.

<sup>2</sup> Bract. 53; cf. 242.

<sup>3</sup> Fol. 46, b.

<sup>4</sup> Fol. 81, 81 b.; cf. 1 Cruise, Dig. 15.

<sup>5</sup> Fol. 23, 208 b.

<sup>6</sup> Fol. 35 b.

<sup>7</sup> Laveleye, Propriété, 67, 68, 116; 4 Kent (12th ed.), 441, n. 1.



test. Easements and the like, however created, and active services claimed by prescriptive right, went with the land. The usual covenant of warranty, and so forth, arising out of the deed or undertaking of the party bound, ran only to privies in title with the covenantee—that is, required a succession. So, at least, the writer interprets the evidence. The well-known case of *Lawrence Pakenham*<sup>1</sup> seems to show the judges hesitating between the two conceptions.

*Pakenham* brought covenant as heir of the covenantee, against a prior, for breach of a covenant by the defendant's predecessor with the plaintiff's great-grandfather, that the prior and convent should sing every week in a chapel in his manor, for him and his servants. Plea: Plaintiff and his servants are not dwelling in the manor. But the defendant, not daring to rest his case on this, pleaded that plaintiff was not *heir*, but his elder brother. Replication: That plaintiff was tenant of the manor, and that his great-grandfather enfeoffed a stranger, who enfeoffed the plaintiff and his wife; and thus plaintiff was tenant of the manor by purchase, and privy to the ancestor; *and also that the services had been rendered for a time whereof the memory was not.* Finchden, J., puts the case of parceners making partition, and one covenanting with the other to acquit of suit. A purchaser has the advantage of the covenant. Belknap (for defendants) agrees but distinguishes. In that case "*l'acquittance chiet sur le terre & nient sur le person.*" Finchden: *à fortiori* in this case; for there the action was maintained because plaintiff was tenant of the land from which the suit was due, and here he is tenant of the manor where the chapel is. Wichingham: If the king grants warren to another who is tenant of the manor, he shall have warren, &c.; but the warren will not pass by the grant, because the warren is not appendant to the manor. No more does it seem the services are here appendant to the manor.

Thorpe to Belknap: There are some covenants on which no one shall have action but the party to the covenant, or his heir. And some covenants have inheritance in the land. [The inhabitants of the land, as well as *every one who has the land*, shall have the covenant.<sup>2</sup>] So that whoever has the land by alienation,

<sup>1</sup> Y. B. 42 Ed. III. 8, pl. 14. This case has been much discussed, and has been said to remain unexplained. Sugd. V. & P. (14th ed.) 587.

<sup>2</sup> Fitz. Ab. Covenant, pl. 17.

*or in other manner*, shall have action of covenant; and, when you say he is not heir, *he is privy of blood, and may be heir*: and also he is tenant of the land, *and it is a thing which is annexed to the chapel* which is in the manor, and so to the manor, *and so he has said that the services have been rendered for all time whereof there is not memory*, whence it is right this action should be maintained. Belknap denied that plaintiff counted on such a prescription; but Thorpe said he did, and *nous le recordomus et adjournatur*.

The reader will see the strong desire to bring the plaintiff within the category of heir to the covenantee, and will be struck by the expressions sounding in inheritance. But assigns not having been mentioned,<sup>1</sup> which, as has been shown, was necessary to give assigns the benefit of the covenant, and the plaintiff not being heir, his right could not be worked out that way. On the other hand, we find expressed with equal clearness the notion, that some covenants may so inhere in the land that whoever has it, and by whatever means, may sue upon them. The suggestion that the service had been rendered immemorially seems to have turned the scale in favor of the latter view.

In the argument of Chudleigh's case,<sup>2</sup> it is said, "Always, the warranty as to voucher requires privity of estate to which it was annexed" [*i.e.*, succession of the party vouching to the original covenantee, to lay a foundation for identifying the two, so that the party vouching may have the benefit of a contract to which, in fact, he was not a party. As was said in Henry Horne's case,<sup>3</sup> "If one would have a writ of covenant, or aid by the covenant, he must be privy to the covenant." Lord Coke continues:] "And the same law of a use. . . . But of things annexed to lands it is otherwise; as of commons, advowsons, and the like appendants or appurtenances. . . . So a disseisor, abator, intruder, or the lord by escheat, &c., shall have them as things annexed to the land. So note a diversity between a use or warranty, and the like things annexed to the *estate* of the land in *privity*, and commons, advowsons, and other hereditaments annexed to the *possession* of the land." The privity of estate required in order that the benefit of a covenant might run with the land, was not privity of estate with the covenantor, as has been supposed by some writers, but only with the covenantee, and

<sup>1</sup> Co. Lit. 385 a.

<sup>2</sup> 1 Co. Rep. 122 b; cf. Co. Lit. 385 a.

<sup>3</sup> Y. B. 2 Henry IV. 6, pl. 25.

this was required for reasons which, it is hoped, have now been made clear. The contrary notion seems to have sprung from the fact that the earliest cases were those of the ancient warranty of vendor to purchaser of land, or else from a misinterpretation of such language as that just cited from Lord Coke.

Space has not allowed more than an incidental allusion to the transmission of the burden of obligations, or the consideration whether the later books would not show a reaction of the conception applied to easements upon the doctrine of covenants.<sup>1</sup>

The general result is, that we must recognize two ways in which a right may be transferred to a person of whom the facts necessary to generate the right, in the first instance, are not true. There must be added to the cases of fictitious identification of persons, the other class where a thing actually incapable of rights has been treated as if capable of them, either by confusion of thought or on grounds of policy. To this extent the reasoning of the article already referred to<sup>2</sup> must be modified. It is believed that its main point has been sustained.

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<sup>1</sup> There were grounds for passing the benefit of a warranty which did not apply to the burden. Anciently, each purchaser vouched his warrantor in turn, and the right of the tenant to look directly to the first grantor was little more than an abridgment of the usual course. (Cf. Bract. 37, 37*b*; Britton, Nichols's ed. i. 256.) But to transfer the burden would have been to create a new liability. Hence we read that one cannot bind his assigns to warranty. "Nullus potest obligare assignatos ad warrantiam quia warrantia semper se extendit ad heredes qui clamant per successionem et non per assignationem." (Y. B. 32 & 33 Ed. I. 516.) It should be remarked, however, that particular land could be bound to warranty (Y. B. 20 Ed. I. 360); and then Bracton says the superior lord and the King are bound in case of escheat and the like, *quia res cum homine* (obviously a misprint for *onere*) *transit ad quemcunque*. (Fol. 382, 382*b*.) Fleta writes *tenebitur quilibet possessor* (Lib. vi. cap. 23, § 17).

<sup>2</sup> 7 Am. Law Rev. 46; cf. 4 Kent (12th ed.), 441, n. 1 *ad fin.*, 480, n. 1.

## INSANITY AS A DEFENCE IN CRIMINAL CASES.

IN the October number of this *Review* appeared an article on "Responsibility in Mental Disease," in which the author, after showing the endless variety of forms in which insanity shows itself, and the gross inaccuracy, from a medical standpoint, of the tests usually applied by the courts for its determination, reaches certain conclusions which many will question. The subject has another side, which it is the purpose of this article to present.

We are prepared to admit at the outset, that, in the eyes of the medical profession, the rules laid down by the English judges in *McNaghten's* case may appear extremely absurd and unscientific; and we are therefore never surprised when we hear physicians inveigh against them, as inadequate to meet the circumstances of one case in a hundred: but we must confess that, to us, such criticism appears to proceed from a mistaken view of the policy and spirit of our laws. That it is difficult, nay impossible, to obtain any formulated standard by which juries can scientifically determine the question of mental health or disease in every conceivable case, cannot reasonably be denied. But, unfortunately for any argument founded on this impossibility, the law requires no such test, and ought not to use it were it obtained.

Inaccuracy of expression in this, as in so many questions, has introduced unnecessary doubt. It is not the *insanity* of the prisoner which is ever at issue in criminal cases: his *punishability* is the sole question. A man may be admittedly as mad as King Lear, and yet be, in the eyes of the law, as amenable to punishment for crimes not resulting from such madness as the most clear-headed citizen of the land. In such a case, fine-spun theories as to the prisoner's moral responsibility, though very comforting to his family when he has paid his debt to Justice, are totally out of place in a legal discussion of his case. *Punishability* exists wherever society can profit by the punishment of the offender, and every man is presumed to be punishable until he is proved not merely to be insane, — which, although essential, is not

sufficient,—but also, in consequence of such insanity, to lack certain mental powers at the time the offence was committed. While this view narrows very much the scope of the investigation in each particular case, we do not claim that it removes all difficulties from this most intricate subject.

Sanity and insanity merge one into the other by not more imperceptible degrees than guilt and innocence: and hereafter, perhaps, at the bar of Almighty God, defences may be allowed which would be derided here; but none the less must human courts administer such rude justice as our minds are capable of, even though we often feel conscious of its deficiencies, and can only trust that the wrong which we do now may hereafter be undone.

The underlying idea of the article to which we have referred finds expression in these words: "This physical existence, the mere animal life of a man, without the power of being of benefit to his fellows, or of raising himself in the scale of thought and feeling, instead of being so sacred and precious a thing, is not a thing of very much consequence,—a thing of no consequence at all in comparison with the interests of the community, or the safety of those lives which are of some value to themselves or others."

This, we contend, is a very inaccurate statement of the theory of modern law, as understood by us. Not that it is not possible to wrest from the words such a meaning as would be consistent with the truth; but, used as the words are, they convey no such meaning to the mind.

"This physical existence, the mere animal life of a man," is a very sacred and precious thing in the eyes of the law, no matter how low, how degraded its possessor; and once to lessen its sacredness, or cheapen its price, is to take a step backward two thousand years, and re-establish the polity of Lycurgus. Life,—the right to breathe as long as the poor lungs can be tortured into working; the right to labor as long as the tired hands and aching back can be strengthened to perform the weary task, and bear the heavy burden; the right to suffer as long as human skill can prolong the power to endure,—to say nothing of the right to health, wealth, love, and honor,—is the highest right of the citizen, the object of the State's most careful solicitude. Every life-saving station along our coast,—every hospital, almshouse, asylum,—bears

ceaseless witness that among us the life of the individual is of greater value than economy or comfort for the public. The only opposing witness is the gallows; and even its awful form really testifies to the deep detestation in which the crime of murder is held, and so to the sanctity of human life.

Over this inalienable right, this unavoidable duty, to deprive one's self of which the law makes as heinous an offence as to deprive another, society exercises a jurisdiction, the limited nature of which is but another sign of the preciousness of human life in its estimation. Let us examine the principles according to which this jurisdiction is exercised, and seek thence some solution of the problem presented by mental disease in its relation to legal punishment.

Certain acts of individuals which are manifestly injurious to the interests of the community, and therefore to be prevented if possible, society has classed together under the common appellation of crimes; and has by law, affixed to their commission certain penalties, that other persons, perceiving the punishment of the offender, may be deterred thereby from like offences. These crimes against human law, although frequently, if not always, involving some infraction of the divine or moral law, are not punished on that account at all, but simply because on their repression must depend the very existence of society. They are equally punishable, whether implying greater or less moral delinquency in the offender; and although it is true that those crimes which the law punishes most severely are also moral offences of the greatest gravity, yet the severity of their punishment proceeds not at all from a consideration of their moral nature, but of their peculiarly injurious effect on the peace of the community, and the consequently increased need of their prevention in the future.

If we are right in this view, then the law has nothing whatever to do with a man's moral condition, or the amount of moral guilt attending the commission of any crime. The sole question for its determination is, whether or not the punishment of the criminal would have any beneficial effect upon society, by deterring others similarly situated from perpetrating a similar crime.

As long as this principle has only to be applied to those in full possession of their mental and physical faculties, there can arise no difficulty. Only when we come to those who, through no

fault of their own, are not masters of themselves, do we encounter any real problems, the true solution of which, in accordance with the principles just laid down, has already been discovered, and enunciated by the English judges in the rules laid down by them in *McNaghten's case*. These rules have been the object of special animadversion by the author of the article referred to. Let us endeavor to determine their correctness, by first applying to the problem the doctrines we contend for, and then seeing how far the English rules coincide with the result.

In defining what shall be the one necessary element of every offence to make it punishable, the English common law has wisely said, "*Actus non facit reus, nisi mens sit rea*" (that is not a criminal act in which there is not a criminal intent). So that the first inquiry in every case is, whether or not the prisoner had or was capable of having a criminal intent. If this be answered in the negative, the offence is wanting, and the prisoner must go free. Again, as the object of all punishment is solely the repression of crime, and criminals are executed solely to furnish an awful example for that end, an equally necessary inquiry is, whether or not the punishment of the individual would thus operate for the benefit of society.

It cannot be denied that persons undoubtedly insane in many respects may and do nevertheless retain, almost unimpaired, their appreciation of right and wrong, vice and virtue, rewards and punishments, and can be, and in every insane asylum actually are, kept in order and discipline by the same means as if they were sane. To deny the right of the law to punish such persons would not be consistent with any of the principles on which society proceeds. For a crime committed by such an one possesses the necessary element of guilty intent, and the offender's punishment would have a direct deterrent effect on others like himself. In strict accordance, therefore, with these views is the provision of the English law, that, in every case, to form a defence, the insanity must be the direct cause of the act. Not only must it be the act of an insane person : it must also be an insane act.

Nor is that alone sufficient ; for even though the act be the direct consequence, and itself a part of the prisoner's insanity, still if he knew it to be forbidden by law, and nevertheless intended to do it and actually did it, there guilty intent is present, constituting a crime, and the punishment of the offender would act as

an example. On the other hand, a lack of appreciation of the fact of unlawfulness clearly precludes all guilty intent, and no crime has been committed. And, again, although the law permits no one to plead ignorance of its commands, yet where the lack of knowledge comes not from ignorance, but from a mental inability to appreciate the application of its provisions to the act in question, there punishment would have no effect as an example, and would be useless. Now, knowledge that an act is unlawful necessarily implies an appreciation of its character and consequences. Sometimes a lack of this latter induces a man to acts, which, were he sane enough to see them in their true character and appreciate their consequences, he would at once know to be unlawful. For these two classes of cases the English rules have made provision, recognizing that a knowledge both of the unlawfulness of the act, and of its character and consequences as regards its object, was essential to constitute a punishable offence.

Now let us examine the answers of the English judges. To us they seem to be a wise embodiment of the results above attained, and to be unshaken by the investigations of medical men.

In *McNaghten's case*, 10 Clark & Fin. 210, four questions were propounded to the judges by the House of Lords. The first of these questions called but for an application of the principles laid down in the answer to the second and third; while the fourth related merely to a point of evidence. The second and third questions were as follows:—

“2. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with an insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?”

“3. In what terms ought the question to be left to the jury as to the prisoner's state of mind when the act was committed?”

In answer to these questions, the judges, speaking by Tindal, C. J., said:—

“As the second and third questions appear to us more conveniently answered together, we have to submit our opinion to be that, . . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know



the nature and quality of the act he was doing, or, if he did know it, he did not know he was doing what was wrong."

The first branch of the answer covers the insanity of the act: it must be an act of which the prisoner was too insane to know the physical nature and quality. As if a man should labor under the delusion that a certain person was enchanted, and could only be restored to his own proper state by having his throat cut. Such a man might take his friend's life, under the firm belief that not death, but life, in a new and improved form, would follow his act, even though well recognizing that death, if it ensued, would make him guilty of a crime. But to punish such a man is to punish him for doing that which he honestly believed to be an act of kindness, and would be of no value whatever as an example.

The second branch of the rule laid down contained the expression, "did not know he was doing what was wrong." Much controversy has arisen under this word "wrong;" and, at the time the answers were given, the judges were asked to change it, but refused, Chief Justice Tindal saying, —

"If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused were conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable."

By this the learned judge clearly intended to lay down the rule, that the prisoner's apprehension of the moral nature of the act was material only so far as it tended to prove or disprove his ability to know the legal nature also. But here a distinction ought, we think, to be taken. While a simple belief that certain things are morally right which the law forbids, furnishes, and ought to furnish, no excuse whatever for crime, it yet seems too restricted to say, that the prisoner's delusions as to the moral nature of his act, *no matter what their character*, are of no importance, and cannot affect the question of his punishability so long as he knows the law forbids it. There is a marked difference between loose, or perhaps insane, notions of morality, and a

crazy delusion that some particular act, the wickedness of which, as a general rule, the prisoner would readily admit, was nevertheless, in that particular instance, not only proper, but actually enjoined upon him by a power which it would be impossible safely to disobey. To illustrate our meaning, an instance of this sort is given in the books. A certain man believed himself to be the Saviour, returned to the world to undergo death a second time, and that by his death innumerable blessings would be brought upon men. But to get himself killed was the difficulty. His moral sense was very keen; and he turned away from suicide as sinful, and therefore ineffectual for his purpose, and murdered a stranger for the very purpose of suffering the death penalty for the accomplishment of his mission.

It is not necessary to enlarge upon the obvious difference between this man's hallucination, and a simple belief that murder is not an offence against the laws of God.

This whole subject received full discussion before a committee of the House of Commons, appointed to consider a bill entitled "The Homicide Amendment Act," introduced by Mr. Russell Gurney, in 1874. The object of the bill was the codification of the criminal law of insanity. It was proposed to extend somewhat the rule in *McNaghten's* case, so as to include all cases where the prisoner did not know the moral nature of the act committed, and also where he was impelled to its commission by an uncontrollable impulse. Amongst other persons, Mr. Fitzjames Stephen, Q.C., the reputed author of the measure, gave at considerable length his reasons for supporting its provisions. As an illustration of the necessity of the rule relieving from punishment where the knowledge of the moral nature of the act was absent, he used the example just cited. We have already endeavored to show that, while such a delusion entitles a man to immunity, — and further than this we do not believe the measure was intended to go, — it is not accurate to characterize such a condition as a simple absence of moral judgment.

But perhaps the most important feature of the proposed change, because the one which was the most marked innovation on previous rules, was that recognizing uncontrollable impulse as a valid defence. To illustrate this change, and the class of cases which it is intended to cover, we cannot do better than to quote Mr. Stephen's own words: —

"I recollect very well that in that case (referring to Dove's case, mentioned before) Baron Bramwell, who tried it, put this question to one of the doctors who was giving evidence that Dove could not help doing what he did: 'Supposing that a man had been standing by him with a loaded pistol in his hand when he was going to poison his wife, do you think he would have done it then?' — 'I do not.' — 'Then he ought not to have done it under these circumstances.' But supposing the doctor had been able to prove from other circumstances that he would have been utterly unable to control himself, and that, if you had put a rope around his neck ready to hang him, still the poison would have gone into that cup, that would have been a case of uncontrollable impulse."

Of course, it is possible that cases such as this may occur; and, for the sake of the argument, we will admit their existence; and will also concede, that, so far as the question of guilty intent is concerned, that element is entirely wanting, as in the case of the poor wretch who, overcome with horror and remorse, even while doing the act, was yet impelled to slay her children by a power impossible to resist. We would urge, nevertheless, the following considerations, as showing not only the inexpediency of recognizing these rare instances as forming a class by themselves, but also the logical inconsistency of allowing insanity of this sort as a defence, even when clearly proved.

It can hardly be doubted that in every such case the horror and fear present in the mind of the lunatic at the time of committing the act tended in some measure, though not efficiently, to restrain from the crime; and that prominent among the causes of such fear and horror was the apprehension of legal punishment and the circumstances of disgrace which would attend it. If this be not so, then the case falls directly under the class of those destitute of an appreciation of the consequences of their acts.

Now, it needs no elaborate argument to convince us that the removal of this powerful restraint, proceeding from the fear of legal punishment, would have a tendency to increase the number of persons in whom such insane impulses would become actually uncontrollable; for we repeat that example exercises an influence little less powerful on the lunatic than on the sane person, if the condition of the former permits him at all to understand the lesson. And, again, uncontrollable impulse and irresistible desire are in

the popular mind already too nearly identical for it to be safe for the law to allow the one to be a valid defence in a criminal trial, lest the other also should obtain a foothold.

That irresistible desire and uncontrollable impulse are in reality very different things, we hold to be clear, and we think that their confusion in the minds of many lawyers and judges has led to many mistakes.

Man is so constituted that his habits and desires, whether of body or mind, by continued indulgence soon overmaster his conscience and his will. Long-nourished hatred and animosity, like long-nourished passion for drink, in many cases stifle all other feelings; so that, when their indulgence is in question, all other considerations, whether of morality or legal consequences, are utterly powerless. In the matter of long-continued and excessive use of spirituous liquors, this fact is more strongly marked, perhaps, than in the case of other excesses; but we are firmly convinced that *delirium tremens* is no more a real manifestation of mental disease than are some conditions of mind to which men have and may come in consequence of the dominion of other passions. Habitual drunkenness the law admits as a disability in civil matters, while utterly disallowing it as a criminal defence; clearly recognizing the entire impotence of the drunkard to restrain his ardent desire for drink, on the one hand, yet, on the other, refusing to recognize the consequences of yielding to this desire as an excuse for a crime. Habitual ferocity, whether manifested towards one from whom an injury, real or fancied, has been received, or towards mankind in general, should be placed on a precisely similar footing; for, by long harboring of such feelings, conscience and the apprehension of consequences can be dulled or destroyed, precisely as the same qualities can be dulled or destroyed in the mind of the drunkard. And, generally, whenever it can be shown, from the circumstances of the case, that the prisoner, even if at the time of the commission of the crime he was so far insane that he had no knowledge that his act was forbidden by law, had lost such knowledge by his own fault, as by the indulgence of some unlawful or forbidden habit or feeling, the natural tendency of which was towards criminal acts,—in every such case the court, while recognizing his insanity as a scientific fact, should disallow it as a defence, and inflict the punishment apportioned to the crime.

The indulgence of thoughts of violence and crime, although not of itself punishable, unless resulting in some criminal act, is nevertheless the germ of crime, and should render punishable every act that springs from it. Such thoughts when first arising in the mind are easily subdued, and weak, compared to the baleful strength they soon acquire. And society has a right to require their immediate extirpation, by punishing them, even when they seek shelter under the garb of madness; thus, by example, deterring others from their indulgence. We are aware that *delirium tremens*, which has long been regarded as a legal defence, would fall under this rule; but our reflections have led us to the conclusions stated above.

Chief Justice Cockburn, in his remarks upon the Homicide Bill (above referred to) said that, while concurring in the rules there laid down, he must object to any limitation of their application to the law of homicide. We certainly are unable to see any adequate reason why a different rule should prevail for different crimes. For as, on the one hand, death is the gravest punishment which the law can inflict, and the utmost certainty of guilt is required for its infliction; so, on the other hand, death is the greatest wrong which one individual can inflict upon another, and the utmost certainty is required in the punishment of the wrong-doer.

Suppose now that a person indicted for larceny should set up, as a defence, that peculiar form of insanity known as kleptomania; but, in sustaining his case, should fail to show that stealing had ever before been indulged in; and, on the other hand, it should be proved that the article stolen was one which there were particular reasons for the prisoner to desire, and therefore one which he would be most likely to take with a felonious intent, and that he had profited by his plunder in a way consistent therewith,—would any amount of curious habits and eccentricities bolster up such a defence, resting on such evidence? Would any intelligent man, let alone any twelve intelligent men, give credit to any such story, unless their judgments were affected by their feelings? And yet precisely similar to this is the case of the man who designedly murders the disturber of his domestic peace, and sets up in defence that he was crazy at the time that the deed was done.

While then accepting the English rules as laid down by the

judges in McNaghten's case, as the best enunciation of the principles which should govern the question of responsibility in mental disease for criminal acts, we would have the law go yet one step further in its inquiries, and, before accepting insanity as a defence, discover, if possible, the responsibility of the prisoner for the existence of the malady which he pleads as an excuse. To do this would not involve questions in any degree more speculative in their nature than those now presented to the courts for solution. And, when accomplished, the courts would be in a position, while punishing the guilty, to furnish to the insane that protection to which, in common humanity, they are entitled.

DAVID B. OGDEN.

THE BENCH AND THE BAR IN FRANCE.<sup>1</sup>

THERE is no other country in the world where it is of so much importance as it is in the United States that the members of the Bench and of the Bar should be upright, intelligent, and educated men ; and there is certainly no other country where so little pains are taken to secure so desirable an object.

The judicial system of many of our States is both vicious in theory and pernicious in practice ; while the want of system in our legal education has led to such deplorable results that a reform is imperatively demanded. Under these circumstances, it cannot be amiss to call the attention of those most interested in the question to any foreign system which seems to produce honest and efficient judges and lawyers.

We propose, therefore, to speak in this article, — first, of the organization and jurisdiction of the French tribunals : the qualifications, mode of appointment, tenure of office, and emoluments of the judges ; and, secondly, of the education, discipline, and functions of the legal profession in France.

## I. JUDICIAL SYSTEM.

1. *Jurisdiction of the Respective Courts.*

There are four grades of judges in the civil (as distinguished from the commercial) courts : 1. The *Juges de Paix* ; 2. The *Juges des Tribunaux de Première Instance* ; 3. The judges called *Conseillers des Cours d'Appel* ; 4. The *Juges de la Cour de Cassation*.

In addition to these, there are the *Juges des Tribunaux de Commerce*, for the trial of commercial cases (these judges being elected from among the merchants of the highest character and

<sup>1</sup> The works consulted in the preparation of this article are the French *Codes et Lois Usuelles* ; Camuzet, "*Manuel de Procédure* ;" Clerc, "*Formulaire du Notariat* ;" the "*Agenda et Annuaire des Cours*, etc.," published by Marchal, Billard, et Cie ; and the *Annuaire* of Didot-Bottin, besides the authorities mentioned in the text.

standing); and the *Prud'hommes*, who are manufacturers, tradesmen, or artisans, and who act as judges only in cases of dispute between manufacturers, tradesmen, and artisans, in relation to their business.<sup>1</sup>

*Jurisdiction of the Juges de Paix.* — The *Juges de Paix* have cognizance of all purely personal suits up to the amount of 100 francs without appeal, and up to 200 francs subject to appeal.

They also take cognizance of suits between innkeepers and their guests, and between travellers and common carriers by land or by water, up to 100 francs without appeal, and up to 1,500 francs subject to appeal. They have likewise jurisdiction up to 100 francs without appeal, and, subject to appeal, up to any amount, in suits between landlord and tenant, in cases where the annual rent does not exceed 400 francs; in suits between master and servant, &c. They have also jurisdiction in civil suits (when no proceedings have been instituted before the criminal courts) for defamation, assault and battery, &c.

Moreover, all cases of a civil (as distinguished from a commercial) character, in which there is but one party defendant, must, as a general rule, be commenced by a summons to appear *en conciliation* before the *Juge de Paix*.

If he can bring the parties to terms, he draws up a *procès-verbal*, or report, showing the conditions of the settlement; if not, he makes a summary mention of their appearance, and the cause is remitted to the *Tribunal de Première Instance*.

*Jurisdiction of the Tribunaux de Première Instance.* — These courts have cognizance of personal actions and those relating to personal property up to the amount of 1,500 francs of capital, and of actions relating to real property of a rental value not exceeding 60 francs, without appeal; and of other actions (always excepting those of a commercial character, in places where there exists a *Tribunal de Commerce*) up to any amount, subject to the right of appeal.

Appeals are also taken to those tribunals from the decisions of the *Juges de Paix*.

*Jurisdiction of the Cours d'Appel.* — These courts have no original jurisdiction, but have appellate jurisdiction in all cases

<sup>1</sup> The organization and jurisdiction of the *Tribunaux de Commerce*, and of the *Conseils des Prud'hommes* are discussed by the writer in an article published in this *Review* for October, 1875. Nothing more will, therefore, be said about them here.



where an appeal is taken from the decisions of the Civil Tribunals of First Instance, or from those of the Tribunals of Commerce.

*Jurisdiction of the Cour de Cassation.*—The functions of this tribunal are to pronounce upon all applications made to set aside judgments rendered by inferior courts *acting as courts of last resort*, applications to have a cause transferred from one court to another, conflicts of jurisdiction, &c. It annuls all proceedings in which the forms of law have been violated, and every judgment which expressly contravenes the text of the law. *Under no pretext, however, can it examine into the merits of the case.*

After having set aside the proceedings or the judgment, it simply sends the case down to be tried over again by a court of the same character and degree as that from which the appeal was taken. It is only in case a second appeal is taken that the *Cour de Cassation*, united, renders a decision interpretative of the law, which is binding upon the court to which the case is then sent for retrial. But such decision is binding only in the particular case, not in any subsequent one,—not even in the *Cour de Cassation* itself.

## 2. *Qualifications, Appointment, Tenure of Office, and Salary of the Judges, and Organization of the Courts.*

The judges of all the courts (except those of commerce and the trades) are appointed by the chief of the executive power; and are all removable only in the cases and subject to the conditions provided by law; except the *Juges de Paix*, who are removable at the will of the appointing power.

*Juges de Paix.*—There is a *Juge de Paix* for each canton, making 2,860 in all; the only qualifications required for this office being that the incumbent be a Frenchman, and thirty years of age. Their salaries vary from 1,800 to 5,000 francs in the rest of France; but are increased to 8,000 francs in the city of Paris.

*Tribunaux d'Arrondissement, ou de Première Instance.*—There is a Tribunal of First Instance for every *arrondissement*; except at Paris, where, though there are twenty *arrondissements*, there is but one such tribunal, called the *Tribunal de la Seine*, whose jurisdiction extends also over the two *arrondissements* of Sceaux and St. Denis,—making three hundred and fifty-nine of such tribunals in the whole of France.

Each tribunal is composed of from three to twelve judges,

besides from three to six supplementary judges, or *Juges suppliants*. The tribunals having only three or four judges form but one chamber; those having from seven to ten judges are divided into two chambers; and those having twelve judges, into three chambers (one of the chambers, in the last two cases, having criminal jurisdiction, as a chamber of *Police Correctionnelle*, in cases of misdemeanor, punishable with not more than five years' confinement in a house of correction). Three judges at least, and six at most, must be present, in order that a judgment be pronounced. Among the judges there is one president, and a vice-president for each chamber, except that in which the president sits. At Paris, however, there are one president, ten vice-presidents, and fifty-eight judges, besides fifteen supplementary judges, or substitutes, — there being twelve chambers, of which *six* take cognizance of ordinary civil suits; *four*, of criminal cases; and *two* of other matters.

No one can be appointed to the office of judge unless he possesses the degree of Licentiate in Law, has kept his terms for two years as an *avocat* of the Tribunal, and is at least twenty-five years of age, — the minimum of age for the president and vice-presidents being twenty-seven years. The salaries received by the judges are excessively moderate, varying from 2,400 to 5,000 francs, except in Paris, — the judges of the *Tribunal de la Seine* receiving 8,000 francs. The salaries of the vice-presidents vary from 3,000 to 6,250 francs for the other tribunals, and amount to 10,000 francs for the Tribunal of the Seine. The president of this latter receives 20,000 francs; the presidents of the other tribunals, from 3,600 to 10,000 francs.

*Cours d'Appel*. — There are twenty-six of these courts in the whole of France. Each court is composed of from twenty to forty justices, or *conseillers*. Those composed of twenty-four justices have three chambers, — one civil, one of indictment for crimes triable at the assizes, and one of appeals in matters of *police correctionnelle*.

The courts composed of thirty justices have four chambers, of which two have jurisdiction in civil suits; and those composed of forty justices have five chambers, three of which are civil. In every court there is one president, and as many vice-presidents as there are chambers. In civil cases, the presence of seven justices is necessary to the validity of a judgment. At Paris,

there are seventy-two justices of this court, including the president and vice-presidents. The same qualifications are required as for the judges of the *Tribunaux de Première Instance*, except that the presidents or vice-presidents must be at least thirty years of age. The salaries of the judges vary from 5,000 to 7,000 francs outside of Paris, in which they amount to 11,000 francs; those of the presidents of chambers are, in Paris, 13,750 francs; and elsewhere, from 7,500 to 10,500 francs. And, lastly, the pay of the first president is from 15,000 to 20,000 francs in the rest of France, and 25,000 francs in the city of Paris.

*Cour de Cassation.* — This court is composed of one first president, three presidents of chambers, and forty-five justices, or *conseillers*, — there being one criminal chamber, having jurisdiction over appeals in criminal cases; one *Chambre des Requêtes*, whose business it is to make a preliminary examination of appeals taken in civil suits, and to reject those which it finds to be clearly unfounded, referring the rest to the *Chambre Civile*; and one *Chambre Civile*, which examines all the appeals so referred to it by the *Chambre des Requêtes*, and gives judgment upon them, — either rejecting the appeal, or else simply annulling the judgment of the court below and directing a retrial of the case, as before stated. The salary of the first president is 30,000 francs; that of the presidents of chambers, the same; and that of the other judges, 18,000 francs.

*Retired List.* — Judges of the *Tribunaux de Première Instance* and of the *Cours d'Appel* are put on the retired list, with a pension, at the age of seventy; and those of the *Cour de Cassation*, at the age of seventy-five. They may also be allowed to retire on a pension, upon due proof of serious and chronic infirmities rendering them incapable of continuing to exercise their functions.

The amount of the pension increases with the number of years passed in active service.

The Paris "*Liberté*" of Nov. 23, 1876, in its comments upon a bill just introduced into the Assembly by the Minister of Justice, remarks as follows: —

"The ninth and last article of the bill provides that the savings effected by the reduction of the number of judges" (*i.e.*, in certain districts of France) "shall be applied towards the increase of magistrates' salaries. We cannot too highly approve this provision. . . . In fact, the salaries of our magistrates having remained stationary for

so many years, while the cost of every thing has so rapidly increased, they find themselves placed in an inferior position as compared with the rank which they are obliged to maintain in society. The consequence is that the judicial career is closed to many who are specially fitted for it, remaining open only to those who are in comparatively easy circumstances independently of the salary attached to their office."

We commend these observations to those in America who, calling themselves *par excellence* the friends of the people, begrudge to their public servants a respectable salary, or even a life-tenure of office; the effect, if not the object, of whose policy is naturally to exclude from every important public position all except the independently rich, or the needy and unscrupulous.

Official salaries can safely be reduced to a certain point, only by conferring the office for life or good behavior. Below that point, what is called *economy* constitutes, at best, an invidious distinction in favor of the rich; and, at worst, the robbery and dishonor of the State.

### 3. *Independence of the Judiciary.*

In theory, the judges of all the higher courts are perfectly independent of the governing power. M. Glasson, Professor at the University of Paris, in his recent excellent work entitled "*Elements du Droit Français*," etc. (vol. ii. p. 212), eloquently remarks:—

"Every thing which compromises or lessens the independence of the judicial power compromises the good administration of justice. The judiciary should be the organ of the law, and not an instrument of government: it renders judgments, and not services. The judicial power, deprived of its independence, is the most formidable instrument of factions and of political hate. The absence of the power of removal" (i.e., at the will of the appointing or governing power) "is one of the surest guaranties of the independence of the judicial power: hence, the spirit of party is naturally hostile to this great principle."

He is, therefore, in favor of extending the principle to the *Juges de Paix*; as they would thus "secure an independence, as towards the executive power, which is necessary to their dignity." It would be difficult to know whether, in popular estimation, the judges are always, in point of fact, entirely independent of

the executive; as the expression of an unfavorable opinion on this point would be dangerous, owing to the stringent provisions of the law of libel, by which every allegation or imputation of a fact derogatory to the honor or consideration of the individual or body to whom the fact is imputed, constitutes a defamation. Such defamation — whether in a public speech, in writing, or in print — of the courts, tribunals, or other public authorities, is punishable by an imprisonment of from fifteen days to two years, and a fine of from 150 to 5,000 francs.

#### 4. *Purity and Efficiency of the Judiciary.*

Upon this subject M. Glasson pithily remarks: "Their traditional integrity, their great enlightenment, and the gravity of their morals, have for centuries honored the judicial bodies of France." The writer may add, that, during a ten years' residence in France, he has never heard it intimated that any judge had been or could be bribed. He has good reason to believe, however, that judges (at all events, those of the lower courts) are accustomed to receive the visits of a party to a suit, or of his lawyer, out of court, and to listen to his *ex parte* statement of the case, in which he is interested. If such party or his legal adviser be a personal friend of the judge, there is evidently great danger that the latter, however honest his intentions, may not approach the trial of the case with a perfectly unbiassed mind. The writer does not assert that such a practice is wholly unknown in the United States; but he does assert that it ought nowhere to be tolerated. If French judges are lacking in knowledge or liberality of views as respects foreign countries, their laws, and customs, and frequently apply French laws and usages with unyielding rigor in controversies between Frenchmen and foreigners, and that, too, even as to acts done or contracts made or to be executed abroad, — thereby securing the interests of the former, to the great detriment and dissatisfaction of the latter, — they only follow the general policy of their government in this respect; which goes so far in its protection of its citizens, and in its distrust of foreign laws and tribunals, as even to refuse the extradition of French criminals, who, after committing the most serious offences abroad, have succeeded in escaping to their native country. (See Billot's "*Traité de l'Extradition*," pp. 64, 67, 68, 70, 72, 73.) Nor would it be surprising if French judges were somewhat deficient in legal *learning*

(in the American acceptation of the term), considering the comparatively small value attached in France to legal precedents.

"Outside of the particular case decided, the interpretation of the law given by the judges has no authority," says Mourlon (in his "*Répétitions écrites sur le Code Civil*," 7th ed. vol. i. pp. 63, 64, § 91), "and binds no one. It is not binding upon other courts, nor even upon the tribunal which has pronounced it. If another cause, entirely new, but in all respects similar, comes before the court, it is free to follow the former interpretation, or to adopt a new one."

## II. THE LEGAL PROFESSION.

### 1. *Avoués and Avocats: their Respective Functions.*

There are two classes of lawyers practising before the courts of First Instance and of Appeal; viz., *avoués*, or attorneys, and *avocats*, or pleaders. The *avocats* of the *Cour de Cassation* discharge at the same time the functions of *avoués*. The *avoués* of the *Tribunaux de Première Instance* are distinct from those of the *Cours d'Appel*; while there is but one body of *avocats* for the two jurisdictions, known as *avocats à la Cour d'Appel*. The employment of an *avoué* is necessary (except that, in theory, a party may defend himself, or select whom he pleases to defend him); while that of an *avocat* is purely voluntary. The former is the agent and representative of the party; the latter is not. The former directs the proceedings, furnishes or receives all communications requisite for the preparation of the case, and lays before the court the demands of his client. The latter argues the cause, and gives consultations. *Avoués* (including the *avocats à la Cour de Cassation*) are obliged to give security for their good behavior,—the amount of which is fixed according to the population of their place of residence, &c.,—while no such security is required of *avocats*.

### 2. *Qualifications for Admission to the Bar.*

In order to be admitted as an *avocat*, the candidate must have obtained the degree in law called "*licence en droit*," for which three years' terms or attendance on the lectures of the Law School, or *Faculté de Droit*, are necessary (these lectures comprising a course of instruction in the history of law; Roman law; the law of nations; common or uncoded law; the French Civil

Code and Code of Procedure; criminal, constitutional, administrative,<sup>1</sup> and commercial law; and political economy); and previously he must have obtained the degree of Bachelor of Letters, after passing an examination in French, Latin, and Greek composition, as well as in literature, history, and philosophy. He must also have passed three years in attendance on the courts, before he can be entered on the rolls and admitted to practice. In order to be received as an *avoué*, the candidate must, in like manner, have obtained the degree of Bachelor of Letters; and then have followed for a year the course of criminal legislation, and of civil and criminal procedure, and have passed an examination before the professors of the Law School. He must, furthermore, have passed five years as a clerk in the office of an *avoué*, in order to be admitted as an *avoué* of a *Cour d'Appel*.

### 3. Appointment of Attorneys, &c.

The *avoués* are limited in number, and are appointed by the chief of the executive power, upon the presentation of the *avoué* retiring in favor of the nominee, or upon that of the legal representatives of a deceased *avoué*. High prices are, in fact, paid for these positions; and M. Glasson states that the total market value of the various venal offices (*viz.*, those of *avocats à la Cour de Cassation*, *notaires*, *avoués greffiers*, *huissiers*, *agents de change*, and *commissaires-priseurs*) throughout France is estimated at 1,000,000,000 francs.

The number of attorneys and practising advocates is very small in proportion to the population; the number for Paris, in 1874, being as follows:—

<i>Avoués près la Cour d'Appel</i> . . . . .	54
<i>Avoués de Première Instance</i> . . . . .	151
<i>Avocats à la Cour d'Appel</i> (having also the right to appear before the inferior courts or tribunals). . .	639
<i>Avocats au Conseil d'Etat et à la Cour de Cassation</i> . .	60

Total of attorneys and barristers for the city of Paris, 904

Adding one hundred and twenty-three *Notaires* (who, though public functionaries invested with important prerogatives, do a

<sup>1</sup> Administrative law, or *Droit Administratif*, is defined by Zachariæ (*Droit Civ. Français*, vol. i. pp. 2, 148) as that whose object is to establish the relations of the executive power and its agents towards individuals, communities, and public establishments.

great deal of the work which in the United States is done by attorneys), we have a total of 1,027 educated lawyers; while, in the city of New York, with a population less than half that of Paris, there are at least 3,500 persons practising as attorneys and counsellors.

#### 4. *Independence of the Bar. — Internal Discipline.*

Both *avoués* and *avocats* are independent of the governing power. The *Chambre des Avoués*, at the head of which is a *President*, and the *Conseil de Discipline des Avocats*, presided over by the *Bâtonnier*, are charged with the duty of maintaining discipline and punishing misconduct among the members of their respective orders, — the punishments consisting of recall to order, censure, public reprimand, expulsion from the *Chambre des Avoués*, and, in the case of *avocats*, temporary suspension, or even striking from the rolls.

As far as we have had an opportunity of judging, the French bar is highly and deservedly esteemed for its ability, learning, and integrity. We refer only to the lawyers, properly so called; for there is a third class, known as *hommes d'affaires*, who may, if provided with a *special power*, represent their clients before the tribunals of commerce or the *Juges de Paix*, and whose business is more particularly that of collection agents. "Of these," says Masson ("*Droit Usuel*," p. 9), "there are some who are honest and perfectly trustworthy; while there are many of bad reputation, and who are the plague of their clients." The French, as a people, express themselves clearly and readily, both in writing and in speech: it is not surprising, therefore, that their leading advocates should have a well-deserved reputation for eloquence, and that French pleadings and judgments should be models of lucidity and logic.

GEORGE MERRILL, *Paris, France.*

#### NOTE.

The following statistics relating to the operations of the civil tribunals throughout France, for the year 1874, are drawn from the last Report of the Minister of Justice (published in the "*Gazette des Tribunaux*" of the 1st, 2d, and 3d January, 1877): —

1. *Juges de Paix.* — The whole number of writs of summons, properly so called, issued by the *Juges de Paix*, during the year, amounted to 2,145,107; there having been a gradual decrease of 500,000 in four years, attributable to the law of Aug. 23,



1871, which requires that such writs shall be on stamped paper of the value of twelve cents. These citations were without result in 860,265 cases. Out of the remaining 1,243,822, the *Juges de Paix* succeeded in bringing the parties to an amicable settlement in 888,267 cases, or 67 per cent of the whole number actually brought before them.

As *conciliators*, in cases coming within the jurisdiction of the *Tribunaux de Première Instance*, their efforts were successful in 18,088 out of 48,688 cases in which the parties appeared, or 48 per cent of the whole number.

Upon this the Minister of Justice remarks that the preliminary attempt at conciliation is not crowned with success as often as might be desired, and as was expected by the legislator. It appears to the writer, however, that this requirement of the law is a useful one in a country like France, though its application might well be restricted to cases where the amount in controversy is not very large; while he doubts whether it would prove of the same value in the United States, where the mass of the people are better educated and more independent (and possibly more inclined to litigation) than the French, and less likely, therefore, to surrender any portion of what they believe to be their rights at the suggestion of a judge of inferior jurisdiction, acting as a conciliator, instead of insisting upon an authoritative determination of the strict law of the case by the competent tribunal. Judgment was rendered by the *Juges de Paix* in 210,116 cases (of which 87,376 by default); 118,204 causes were arranged at the hearing; and 64,698 were abandoned. There were thus 382,917 causes actually terminated; leaving a balance unsettled of 8,212, or only *two per cent* of the whole number brought before them!

2. *Tribunaux de Première Instance*.—Out of 170,802 cases coming before these tribunals, 70,547 were tried and determined after hearing both parties: in 34,542 judgment was given by default; and 85,292 were terminated by compromise or withdrawal,—leaving a balance of 29,921 remaining at the close of the year. Justice is administered in these courts much more expeditiously, we imagine, than in most of the United States. Thus, out of the 140,881 causes, of which the rolls were cleared in 1874,—

77,860,	or 55 per cent,	lasted only three months, or less.
22,022,	" 16 " " " "	from three to six months.
27,281,	" 20 " " " "	" six months to one year.
10,411,	" 8 " " " "	" one year to two years.
8,307,	" 2 " " " "	more than two years.

8. *Cours d'Appel*.—There were 16,486 cases brought before the 26 *Cours d'Appel* during the year, of which 11,056 were terminated. In 2,392 of these latter, a compromise was effected; 559 judgments were given by default; and 8,105, after hearing both parties.

The number of cases thus carried up on appeal was 11 per cent of the whole number decided by the civil tribunals acting as such (that is, in civil as distinguished from commercial cases); 10 per cent of those decided by the same courts acting as tribunals of commerce (in places where there are no such tribunals); and 12 per cent of the cases decided by the special *Tribunaux de Commerce*. Out of the whole number of judgments appealed from, 71 per cent were affirmed. As regards the commercial cases brought up on appeal, 72 per cent of the judgments rendered by the commercial tribunals, properly so called, were affirmed; and only 62 per cent of those rendered by the *Tribunaux Civils* acting as commercial courts.

4. *Cour de Cassation*.—There were only 850 new cases brought before this court during the year; of which, 418 from the *Cours d'Appel*, 143 from the *Tribunaux*

*Civils*, 41 from the *Tribunaux de Commerce*, and 204 from the *Justices de Paix*, — the few remaining cases being those of a special character, coming from other sources. The *Chambre des Requêtes* was called upon to pronounce in 1,258 cases ; comprising 813 of the above, and 440 remaining over from the previous year. Of these, 704 were brought to a conclusion ; namely, 470 by decrees of rejection, 285 by decrees of allowance (the effect of which, as explained in the text, is to remit them to the *Chambre Civile*), 24 by withdrawal, and 5 in other manners. The *Chambre Civile* had 361 cases before it (including 104 remaining from 1873). Out of these, 7 were withdrawn ; in 92, the appeals were rejected ; in 157, the judgments appealed from were set aside ; and 105 cases went over to the following year.

It will thus be seen that a very small number of cases are carried up to the highest court ; and that less than one-fourth of the appeals brought before it are sustained.

## DIGEST OF THE ENGLISH LAW REPORTS FOR FEBRUARY, MARCH, AND APRIL, 1877.

ADMINISTRATION. — See EXECUTORS AND ADMINISTRATORS.

ANTENUPTIAL AGREEMENT. — See MARRIAGE SETTLEMENT, 2.

### APPOINTMENT.

K. gave a life-estate to his daughter M., with power of appointment in M. among her "children," and in default of appointment to all her children equally. M. appointed to two daughters, one of whom was illegitimate and could not take. *Held*, that the other took one half, and the other half went to her and the other legitimate children of M. equally. — *In re Kerr's Trusts*, 4 Ch. D. 600.

ASSETS. — See BANKRUPTCY.

ATTESTATION. — See WILL, 1.

ATTORNEY AND CLIENT. — See LIEN.

### BANKRUPTCY.

1. B., a wine-merchant, in 1857, undertook to marry W., his deceased wife's sister, and they lived together from that time. In 1876 B. went into liquidation, and W. filed her proof for £3,000 "for money lent, advanced, and paid" by her to B. in 1858. The evidence was, that it was agreed that B. should use the money in his business, but that for £2,000 thereof he should be a trustee for W., and that a settlement should be executed. This was, however, never done. *Held*, that W. could not prove her claim as against other creditors. They must first be paid in full. — *In re Beale. Ex parte Corbridge*, 4 Ch. D. 246.

2. M. informed B. that he had forged his name on a note for £100; that the note was just due, and he could not pay it; that if B. would pay it, and thus save M.'s family from disgrace, he would give B. a bill of sale of all his effects for this £100, and another like sum, which he owed B. before this transaction. B. accepted the bill of sale, and paid the note on which M. had forged his name. Subsequently M. became bankrupt, and in a suit by the trustee in bankruptcy against B. for the proceeds of the goods sold him by M., *held*, reversing the decision of the Chief Judge, that there had been no offence against the bankrupt law, however the transaction might have affected B. in a suit where he was plaintiff, and that the trustee could not recover. — *In re Mapleback. Ex parte Caldecott*, 4 Ch. D. 150.

See COMPOSITION; FRAUDULENT PREFERENCE; PARTNERSHIP.

## BEQUEST.

1. Will in the following words: "I . . . bequeath to G. all that I have power over, namely, plate, linen, china, pictures, jewelry, lace, the half of all valued to be given to H. . . . The servants . . . to have £10 and clothes divided among them. Also all kitchen utensils." The testatrix had money and much other personal property besides that specified in the will. *Held*, that the will covered all the personal property of the testatrix. — *King v. George*, 4 Ch. D. 435.

2. Testator bequeathed all his remaining property after bequests, to his wife, "for" her "to do justice to those relations on my side such as she think worthy of remuneration, but under no restriction to any stated property, but quite at liberty to give and distribute what and to who my dear wife may please." *Held*, that there was no precatory trust created thereby. — *In re Bond*. *Cole v. Hawes*, 4 Ch. D. 238.

## BILL OF LADING.

A bill of lading recited that a cargo of feathers and down was shipped on board at St. Petersburg, "in good order and condition, . . . to be delivered in the like good order and well-conditioned" in London. There was the usual list of excepted perils, and in the margin the words, "Weight, contents, and value unknown." The goods coming out damaged in London, the consignees sued the ship, and it was proved that the damage was recent, and that it appeared to come from without and not from within. *Held*, that in spite of the marginal note the bill of lading was evidence that the goods were externally in good order when taken on board; that thus a *prima facie* case was made out, which it was for the defendants to upset by positive evidence of inherent defects in the goods. — *The Peter der Grosse*, 1 P. D. 414.

BILLS AND NOTES. — See EMBEZZLEMENT, 2; NEGOTIABLE INSTRUMENT.

BOND. — See COLLISION, 3.

## BOTTOMRY BOND.

A master has no authority to give a bottomry bond on the ship, or hypothecate the cargo, without sending word to the owners of the necessity therefor, if communication is possible. — *Kleinwort, Cohen, & Co. v. The Cassa Marittima of Genoa*, 2 App. Cas. 156.

## BROKER.

P., a broker, in a contract for butter, delivered bought and sold notes to the plaintiff and to the defendant. He signed the first, but not the second; and he made a note of the transaction in his note-book, and signed it. The defendant kept the broker's note till called upon to accept the goods, when he objected, on the ground that the note was not signed. *Held*, that the defendant was bound by the sold note, that he virtually admitted that the broker had authority to act for him, by his giving no reason for repudiating the bargain but the fact that the broker did not sign the note, and that the memorandum in the broker's book was sufficient to take the sale out of the Statute of Frauds. — *Thompson v. Gardiner*, 1 C. P. D. 777.

See FRAUDULENT PREFERENCE; PRINCIPAL AND AGENT, 1.

BURDEN OF PROOF. — See BILL OF LADING.

CARGO. — See CONTRACT, 4.

CARRIER. — See COMMON CARRIER.

#### CHARTER-PARTY.

Charter-party by plaintiff for the ship C. for twelve months from the completion of her present voyage. When the C. got in she was declared unseaworthy, and it took two months to repair her. *Held*, that the charter-party could be thrown up by the plaintiff, time being of the essence of the contract. — *Tully v. Howling*, 2 Q. B. D. 182.

See DAMAGES, 2.

CHECK. — See EMBEZZLEMENT, 2.

#### CLASS.

S. by will gave estate in trust for all his children, "who being a son or sons have attained or shall attain twenty-one years, or being a daughter or daughters have attained that age or been married, or shall attain that age or be married," the sons' shares to be for their own absolute use and benefit. The daughters' shares were to be held for their separate use during their lifetime, and after for their children. In case a son died in testator's lifetime leaving children, the children took in place of the father. There was no such provision in case of a daughter's predecease. A daughter died in the testator's lifetime leaving children. *Held*, that these children were entitled to their mother's share under the will. — *In re Speakman*. *Unsworth v. Speakman*, 4 Ch. D. 620.

See CONSTRUCTION, 2; DEVISE.

CODICIL. — See WILL, 1.

#### COLLISION.

1. Action by skiff E. against steamer C. for injury to the E., caused by alleged negligence of the C. in colliding with the E., while the C. was coming into the dock and the E. was lying inside. On the evidence, *held*, that the C. was to blame. — *The Cynthia*, 2 P. D. 52.

2. Collision between the bark O. and the steamer P. in the Tyne. The P. was properly moored, but was run into during a gale by a brig adrift in the river. In consequence one of the rings of the buoys gave way, and the P. drifted, and struck and damaged the O. as she was lying moored. No lookout was posted on the P., though the weather was growing boisterous, and it was shown that her chain cables were unbent. *Held*, on the evidence, that the steamer was alone to blame. — *The Pladda*, 2 P. D. 84.

3. In a suit for wages and disbursements between a master and a mortgagee of the ship, the court refused to retain in court a sum of money sufficient to satisfy a certain bond (in case it should ever be presented), which the master had given to release the ship after a collision happening from his neglect. — *The Limerick*, 1 P. D. 411.

See DAMAGES, 2.

COMITY. — See JURISDICTION, 1.

## COMMON CARRIER.

Plaintiff took a ticket from Boulogne to London over defendants' steam-boat line and railway. On the ticket it was stated that each passenger was allowed 120 pounds of luggage free, and that the company was responsible for no more than £6 value. Plaintiff's box was damaged through negligence of defendants' servants to the amount of £73. By the Railway and Canal Traffic Act of 1854, § 7, it is provided that railway companies shall be liable for loss arising from their negligence in the carriage of goods, notwithstanding any notice of non-liability they may have given, — and passengers' luggage taken free of charge is included in the statute. *Held*, that the plaintiff could recover. — *Cohen v. The South Eastern Railway Co.*, 2 Ex. D. 253.

## COMPANY.

1. The directors of a company, having authority, issued "mortgage obligations," or debentures, which they advertised to sell at par. They found that the debentures would not sell at par, only two small purchasers being secured at that rate; and they proceeded to sell them to the public at  $7\frac{1}{2}$  per cent discount. At this rate C., a director, took some. On the winding up of the company the liquidator proceeded against C. for the balance between what C. paid for the bonds and the par value. *Held*, that C. was not liable. — *In re Compagnie Générale de Bellegarde. Campbell's Case*, 4 Ch. D. 470.

2. S. agreed for the sale of mining property to the trustee for a company in formation. The purchase-money was to be paid in instalments. The vendor guaranteed a dividend of seven per cent; and it was provided that so much of the last two instalments of purchase-money as was necessary to secure this dividend on the shares issued for four years should be invested in Consols. One-eighth of this fund was to be paid to the directors after each of the first eight semi-annual meetings. The guarantee was specially published, and the agreement mentioned in the articles of association of the company. It was provided therein that the sums paid the directors from the guarantee fund should "be considered as profits, and applicable only to the payment of dividends." Before the end of the four years the company went into voluntary liquidation. The directors had received money under the guarantee, and had made payments out. They now paid the sums in their hands into court. *Held*, on the petition of a shareholder to have the proceeds of the guarantee fund in court declared the private property of shareholders, that such proceeds should be paid to the official liquidators as assets of the company. — *In re Stuart's Trusts*, 4 Ch. D. 218.

3. L. claimed to be admitted as a creditor in the winding up of the M. company in respect of one hundred bonds of the company at £20. L. was made a director of the company at its first meeting, and attended the second and subsequent meetings. At these meetings it was voted to purchase certain property for £3,825,000, and the bonds in question were part of £452,000 issued by the directors, in part payment thereof. Sept. 5, 1867, L. seconded a motion, which was passed, for winding up the company. Dec. 16, 1867, he resigned as director. March 25, 1868, he bought these bonds for £587 10s., their alleged market value. In a later suit by the company for fraud against

the seller of the property in question, it appeared that the real price paid for the property was £2,665,000, and the balance of £660,000 was pocketed by the promoters of the company. L. denied that he knew of any such transactions regarding the purchase. *Held* (by MALINS, V. C.), that his claim must be disallowed. On appeal, the suit was compromised by allowing L. what the bonds cost him. — *In re Imperial Land Company of Marseilles. Ex parte Larking*, 4 Ch. D. 566.

See *ULTRA VIRES*.

COMPOUNDING FELONY. — See *BANKRUPTCY*.

CONDITIONS AT SALE. — See *CONVEYANCE*.

CONSIDERATION. — See *BANKRUPTCY*.

### CONSPIRACY.

Second count in an indictment for conspiracy to defraud: That defendants, promoters of the E. Company, Limited, applied to the Stock Exchange Committee for leave to have the E. Company put on the list of quotations of the Stock Exchange, under two rules of the Stock Exchange, Nos. 128, 129. These rules provided that a new company would be quoted when two-thirds of the whole nominal capital had been applied for and unconditionally allotted to the public; and a member of the Stock Exchange was authorized by the company to give information concerning it, and was able to satisfy all the requirements of the committee. That defendants employed brokers to give the information required, and to make application to the committee to quote the shares; that the defendants employed the brokers to sell on behalf of certain pretended vendors of patents 5,000 shares of the stock, and conspired unlawfully to injure and deceive the committee by inducing them to order said quotation, and thereby to persuade her Majesty's liege subjects to purchase said shares, by making them think that the company had complied with the rules of the Stock Exchange. That they falsely pretended to Z. and other members of the committee that 34,365 shares had been applied for by the public, and the amount received therefor was £17,282; that 15,000 shares had been allotted to the patentee, and none allotted conditionally; and that by means of the premises they induced the committee to order the quotation. *Held*, that a verdict of guilty of conspiracy under this count must be sustained, though the allegations were very inaccurately stated. — *The Queen v. Aspinall*, 2 Q. B. D. 48.

### CONSTRUCTION.

1. H. E. died in 1819, leaving a will dated in 1814. In it he devised real estate to R. S., second son of Sir T. S., for life, remainder to R. S.'s first and other sons in tail male, remainder to J. S. and C. S., younger sons of Sir T. S., in tail male. In case the said R. S., J. S., or C. S. "shall become the eldest son of the said Sir T. S., then and in such case, and so often as the same shall happen," the estate so devised to cease and determine as though "the person so becoming the eldest son of said Sir T. S. was then dead without issue male." C. S. died, childless, in 1834. Sir T. S. died in 1841, and his eldest son succeeded to his titles. He died, childless, in 1863, and the second son, R. S., succeeded. He died in 1875, without issue male. In an

action by the testator's right heirs for the estates as against J. S., *held*, that J. S. had become "the eldest son of Sir T. S.," within the meaning of the will, and was thereby disentitled. — *Hervey-Bathurst v. Stanley*. *Craven v. Same*, 4 Ch. D. 251.

2. Testator gave to trustees a fund of £66,666 13s. 4d. upon trust to pay £1,000 a year, being the interest of one-half, to his daughter A. B., and the like to his daughter E. B., during their lives; and, after the decease of either daughter, "I give . . . the said £33,333 6s. 8d., . . . being such daughter's share, unto and among all and every such child or children she may happen to leave at her decease, to be equally divided between them when and as they shall respectively attain the age of twenty-one years, and if but one child, then to such child; and in case either of my said daughters shall die without issue, then I direct that" her share be transferred by the trustees as said daughter should by will appoint. A. B. had a daughter who married, and died in 1869, leaving five children, who are all now living, and are all over twenty-one. A. B. died in 1876, having made a will, in which she exercised the power of appointment given in her father's will in case she should "die without issue." *Held*, that the power was properly exercised, "issue" meaning children of the tenant for life. — *In re Mercer's Trusts*. *Davies v. Mercer*, 4 Ch. D. 182.

See BEQUEST, 1, 2; CLASS; CONTRACT, 4; DISTRIBUTION; LEASE; MARRIAGE SETTLEMENT, 1, 2; TRUSTEE, 1, 2.

CONSTRUCTIVE NOTICE. — See COMPANY, 3.

#### CONTRACT.

1. Contract by defendants to buy from plaintiffs 600 tons of rice, to be "shipped" at Madras in the months of March <sup>and</sup> April, 1874, per ship *Rajah*. 7,120 bags of the rice were put on board the *Rajah* between the 23d and 25th of February, and the three bills of lading therefor were signed in February. Of the 1,080 remaining bags, 1,080 were put on board Feb. 28, and the rest March 3, and the bill of lading for the 1,080 bags bore the latter date. There was evidence that rice put on board in February was as good as that put on board in March or April. *Held*, that the defendants were bound to take the rice. The word "shipped" construed. — *Shand v. Bowes*, 2 Q. B. D. 112.

2. By 8 & 9 Vict. c. 109, § 18, "agreements by way of gaming or wagering" are void. Plaintiff, who was a "tipster" (i.e. one who gave advice on the probable winning horse), and defendant agreed that plaintiff should lay out £2 in betting on a horse R. in a steeple-chase, at odds of 25 to 1. If R. won, plaintiff was to have £50 from defendant out of his winnings if he backed R. If R. lost, plaintiff was to pay defendant £2. Defendant backed R., R. won, and defendant made on his bets £250. Of this, plaintiff claimed £50. *Held*, that this arrangement came within the statute. — *Higginson v. Simpson*, 2 C. P. D. 76.

3. Oct. 31, 1874, the C. company made a contract with the P. company to sell the P. company 2,500 tons iron, to be delivered in monthly instalments over ten months, "payment by four month's bill net, or cash less 2½ per cent discount, on the 10th of the month next following each delivery." Nov. 4,



1874, a second contract was made, for 2,500 tons during the next ten months, for cash on the 10th of the month following delivery, with the same discount. Jan. 11, 1875, another similar contract was made. Feb. 24, 1875, after deliveries had been made under the first and second, but none under the third, contract, the P. company called a meeting of its chief creditors, including the C. company, and asked for an extension, saying the business was going on at a loss. It was refused; and the C. company refused to deliver more iron except for cash; whereupon the P. company wrote to rescind the contracts; but there was no evidence that the C. company got the notice. The P. company managed to get along until May, 1875, when its affairs became so bad, that, June 9 following, voluntary winding-up proceedings were begun. The C. company claimed to prove as creditors for £2,738 for breach of the three contracts. *Held*, that the claim should be disallowed, on the ground that there was no such insolvency, or declaration of insolvency, on and after Feb. 24, as to authorize the C. company to refuse to deliver the iron except for cash. — *In re Phoenix Bessemer Steel Company. Ex parte Carnforth Hematite Iron Company*, 4 Ch. D. 108.

4. Defendants bought of plaintiffs "a cargo of from 2,500 to 3,000 barrels (seller's option) American petroleum, . . . to be shipped from New York during the last half of February next, and vessel to call for orders off coast for any safe floating port in the United Kingdom, or on the Continent between Havre and Hamburg, both inclusive (buyer's option)." Plaintiffs shipped 3,000 barrels, consigned by bill of lading to defendants. To fill up the ship, they put on board 300 barrels more, marked in a different way and under another bill of lading. Plaintiffs gave notice of the shipment, offering to conform to the contract as to calling for orders and port of landing, and to deliver either 3,000 or 2,750 barrels to defendants there, and take the balance themselves. Defendants refused to accept any. *Held*, that defendants were not bound to accept any, the contract having been for a "cargo," and cargo signifying all a ship carries. — *Borrowman v. Drayton*, 2 Ex. D. 15.

See INFANT; PRINCIPAL AND SURETY; SALE; TELEGRAPH; VENDOR AND PURCHASER, 1.

#### CONVEYANCE.

Plaintiffs were trustees, and put up the trust estate at auction under this condition, *inter alia*: "The property is sold, and will be conveyed subject to all free rents, quit-rents, and incidents of tenure, and to all rights of way, water, and other easements (if any)." Defendant was the purchaser, and objected to the insertion of the above words in the conveyance. *Held*, on claim for specific performance, that defendant was bound to accept the conveyance in the above form. — *Gale v. Squier*, 4 Ch. D. 226.

#### COPYRIGHT.

Defendant wrote a play, in which it was found as a fact that he took two "unimportant" "scenes or points" from a play of the same name belonging to plaintiff. *Held*, that, under the Dramatic Copyright Act, 3 & 4 Wm. 4, c. 15, § 2, the defendant was not liable. — *Chatterton v. Cave*, 2 C. P. D. 42.

## COVENANT.

A covenant not to carry on a trade within certain limits is broken by the covenantor's selling goods as a journeyman within the prescribed limits, for a third party carrying on the trade in question. — *Jones v. Heavens*, 4 Ch. D. 636.

CREDITOR. — See COMPANY, 2; EXECUTOR AND ADMINISTRATOR.

## CUSTODY OF CHILD.

Custody of a boy three years old given to the mother, who had been deserted by her husband, father of the child. 36 & 37 Vict. c. 12. — *In re Taylor, an Infant*, 4 Ch. D. 157.

## DAMAGES.

1. Action under sect. 6 of the Admiralty Court Act, 1861 (24 Vict. c. 10), by the assignee of a bill of lading, to recover damages for delay in the delivery of the cargo. The liability was admitted, and the question of damages was referred to the registrar. He reported that interest at five per cent on the value of the invoice from the time when the cargo should have been delivered, and the time of its actual delivery, was the proper measure of damages; but he found as a fact that the market value of the goods had fallen during that time. *Held*, that he should have included in the damages the difference in market value. — *The Parana*, 1 P. D. 452.

2. In a suit for damages resulting from collision, the ship in fault acknowledged the liability, and the question of damages was referred to the registrar. He refused to allow as an item of damage the loss of a charter-party by the vessel injured, resulting from the delay caused by the collision. *Held*, that the loss of the charter-party must be taken into the account in estimating the damages. — *The Star of India*, 1 P. D. 469.

DEBENTURES. — See COMPANY, 1.

## DEED.

The manager of a bank, which had already made advances to and taken mortgage securities therefor from one B., agreed to make further advances on further security being tendered; and B. thereupon pointed out to him three houses on C. road, which he would give as security subject to a prior mortgage. In pursuance of this arrangement, an instrument was executed by B. to the bank, in which the three houses were described as conveyed in leasehold to B. by one L., "by indenture dated the 25th of September, 1874." In fact, only one of the three was comprised in that lease, the other two having been conveyed by lease to B. by L., Dec. 31, 1874. B. went into liquidation; the three houses were sold by the first mortgagee, and a sufficient sum remained out of the proceeds of the sale to pay the whole claim at the bank. *Held*, that the bank was entitled to the amount of its claim out of the proceeds of the three houses. — *In re Boulter. Ex parte National Provincial Bank of England*, 4 Ch. D. 241.

## DEVISE.

C. devised five houses to "all and every the children of my late brother J. C. who shall be living at my decease, or who shall have died in my lifetime

leaving issue living at my death, in equal shares as tenants in common." Subsequently by codicil it was recited that some of the children of J. C. had lately died without issue; the previous devise of the five houses was revoked, one of the houses was given to another devisee, and the remaining four devised to J. C.'s children in the precise words previously used in the will. J. C. had four children living at the testator's death, and one had died during the life of the testator leaving children. *Held*, that the four children of J. C. living at the testator's death took the whole of the four houses, as members of a class. — *In re Coleman & Jarrom*, 4 Ch. D. 165.

See CONSTRUCTION, 1.

DIRECTOR. — See COMPANY, 1, 3; ULTRA VIRES.

#### DISTRIBUTION.

Testator gave £10,000 in stocks to trustees, to pay £7,500 to certain of his grandchildren named, and the interest on the £2,500 to be paid to M. B. for life, and after his death the sum itself to be paid to the children of J. B., daughter of the testator, deceased, or their descendants; but should there be none of them surviving, "then it should be divided amongst such other grandchildren as I may then have living, or in default thereof to my legal representative." J. B. had seven children, three died unmarried in the lifetime of the testator. One of the four survivors survived the tenant for life, and one only of the three, so dying before the tenant for life, left issue. *Held*, that the children of J. B. who survived the testator, or their representatives, were the persons entitled to take. — *In re Dawes's Trusts*, 4 Ch. D. 210.

#### DIVORCE.

Suit for nullity of marriage by the wife for the husband's impotence. The petitioner was forty-seven years old, and was married to respondent in 1849. The evidence showed that the petitioner was still *virgo intacta*. There was also evidence of bickerings between the parties. *Held*, that there was no excuse for such long delay in instituting proceedings, and the petition was dismissed. — *W.*, falsely called *R. v. R.*, 1 P. D. 405.

DOMESTIC RELATIONS. — See CUSTODY OF CHILD; DIVORCE; DOWER; MARRIAGE SETTLEMENT, 1, 2.

#### DOWER.

Mortgage in the ordinary form, with power of sale by D., with release of dower by wife, made Dec. 24, 1846. Nov. 3, 1854, D. made a second mortgage in similar form, but conveying "freed and discharged of and from all right and title to dower" on the part of his wife, and subject to the mortgage of Dec. 24, 1846. Dec. 4, 1858, the second mortgagees paid the first mortgagee, and took a conveyance of the premises from the latter, subject to the equity of redemption in the first mortgage. In October, 1860, default was made on the second mortgage, and the mortgagees sold the property. Nov. 21, 1874, D. died, and Oct. 14, 1875, his wife filed her bill against the mortgagees for the value of her dower in the equity of redemption sold by them. D. and his wife were married before the Dower Act. *Held*, that she was entitled. — *Dawson v. Bank of Whitehaven*, 4 Ch. D. 639.

## EASEMENT. — See WAY.

## EMBEZZLEMENT.

1. Indictment under 24 & 25 Vict. c. 96, § 75. Prisoner was an insurance broker, and received in the latter part of December the amount of two policies sent to him for collection by the prosecutor. The amounts were sent him by check to his own order, and he placed the checks to his own credit in his own bank. He was pressed for the money by the prosecutor, and made excuses for not paying it over at once. January 27 following he filed a petition in bankruptcy, and his balance at his bank turned out to be much less than the amount of the said checks. *Held*, that on these facts a conviction, "for that he being a broker, attorney, or agent, was intrusted with securities for a particular purpose, without authority to sell, negotiate, transfer, or pledge them, and that he unlawfully, and contrary to the purpose for which said securities were intrusted, converted a part of the proceeds thereof to his own use," could not be maintained. — *The Queen v. Tatlock*, 2 Q. B. D. 157.

2. The prisoner was clerk of the L. Insurance Company, and was in the habit of opening letters and receiving remittances, which he handed to the cashier, an officer under himself. If checks were sent, it was his duty to indorse them as though payable to his own order, and hand them to the cashier, who deposited them to the credit of the company, and accounted for them in his books. Prisoner received two checks in payment of dues to the company, payable to his own order. Instead of indorsing these in the usual way, and passing them to the cashier, he got the money on them from private friends, and turned it over to the cashier in payment of an overdraft of his salary, which he had made, and for which he had given his I O U's. The cashier supposed the money was the prisoner's, and gave him back the I O U's. *Held*, on an indictment for embezzling the "proceeds" of the checks, that the transaction constituted a case of embezzlement, and that the conviction must stand. — *The Queen v. Gale*, 2 Q. B. D. 141.

## ENGLISH CHANNEL.

The rules for vessels on the high seas, and not those applying to river navigation, obtain for the English Channel, and there is no customary course for vessels there. — *The Franconia*, 2 P. D. 8.

## ESTOPPEL. — See NEGOTIABLE INSTRUMENT.

EVIDENCE. — See DEED; EMBEZZLEMENT, 1; NEGLIGENCE, 1, 2.

## EXECUTORS AND ADMINISTRATORS.

1. Letters of administration *ad colligenda bona* were granted to a creditor on the estate of a schoolmaster, whose next of kin were unknown, and the school interest was likely to suffer and decrease in value from the delay likely to happen in the appointment of a regular administrator. — *In the Goods of Schwerdtfeger*, 1 P. D. 424.

2. The business of a trader was carried on by his executrix, who was residuary legatee, after his death, as her own. *Held*, that she could not be considered a trustee for her husband's creditors with respect to the assets of

the business, and that they passed on her marriage to her second husband. — *In re Fells. Ex parte Andrews*, 4 Ch. D. 509.

#### FIXTURES.

Leasehold property was demised to E., a timber merchant. Lessee covenanted that he would build a steam saw-mill or dwelling-houses; that he would keep the same in repair, and at the end of the demise deliver to the lessor the ground and buildings, and all fixtures and other things whatsoever which should be fixed to the freehold, in good repair, &c., except the steam saw-mill, apparatus, machinery, fixtures, and things connected therewith, which the lessee had liberty to remove. E. subsequently mortgaged his interest, including the ground and premises named in the lease, "together with the steam saw-mill, offices, erections, and buildings, which have been erected . . . upon the said . . . ground; and the steam-engines, boilers, fixed and movable machinery, plant, implements, and utensils now or hereafter fixed to or placed upon or used in or about the said grounds. . . . To have and to hold the said hereditaments, and such of the machinery, plant, utensils, and premises . . . as are in the nature of landlord's fixtures, and cannot lawfully be removed by the lessee," to the mortgagee for the balance of the term, "and as to the rest of the said machinery and premises as are in the nature of tenant's or trade fixtures, and can lawfully be removed by the lessee thereof," to the mortgagee absolutely. The deed was not registered. E. went into liquidation, and the mortgagee had not entered. *Held*, that the deed gave the mortgagee the right to remove the trade fixtures, specified, and as the mortgage had not been registered under the Bills of Sale Act, the official liquidator was entitled to the severable property. — *In re Eslick. Ex parte Alexander*.

FORECLOSURE. — See MORTGAGOR AND MORTGAGEE, 8.

#### FOREIGN JUDGMENT.

The Italian bark E. F. brought suit against the French steamship D., in Marseilles, for collision. The D. began a cross-suit there for the same cause. The D. got judgment in both suits by default. In a suit in England by the E. against the D. for the same cause, the D. pleaded the foreign judgments by default, in bar. *Held*, that the defence was not good. — *The Delta. The Erminia Foscolo*, 1 P. D. 398.

FRAUD. — See COMPANY, 8; PARTNERSHIP; PRINCIPAL AND AGENT, 2; SALE.

FRAUDS, STATUTE OF. — See STATUTE OF FRAUDS.

#### FRAUDULENT PREFERENCE.

The Stock-Exchange rules provided that a member unable to meet his engagements on the Exchange should be declared a defaulter, cease to be a member, and not be eligible for re-admission without paying one-third his Stock-Exchange debts. The committee of the Exchange were to collect the defaulter's assets, and pay them out *pro rata* to his Stock-Exchange creditors. Outside creditors were not to be recognized. C., a member, had been declared

a defaulter, and had given a check for £5,000 to the committee for his Stock-Exchange creditors. He afterwards went into bankruptcy. *Held*, that the £5,000 must be given up to the trustee in bankruptcy for the general creditors. — *Ex parte Saffery*. *In re Cooke*, 4 Ch. D. 555.

FUND IN COURT. — See COLLISION, 3.

#### GENERAL AVERAGE.

The ship *J. B.* sailed in 1873 from Q. to L., in proper order for the voyage, and had a donkey-engine, fitted for use with coal, for pumping. In 1876, it was the custom to have such an engine on such ships, but in 1873 such custom was not general. On the voyage, the ship sprang a leak, from unusually bad weather; and the men being worn out and unable to keep ahead of the water from the leak by hand-pumping, the donkey-engine was attached. The supply of coal consequently was growing short, and the captain used some of the ship's spars, and also some of the cargo, which was timber, as fuel. In consequence of these measures, the ship, with the remainder of the cargo, was brought in in safety. In an action against the consignees of a part of the cargo, *held*, that they were liable in general average for the spars and timber consumed. — *Robinson v. Price et al.*, 2 Q. B. D. 91.

GIFT TO CLASS. — See CLASS.

GUARANTEE FUND. — See COMPANY, 2.

HUSBAND AND WIFE. — See BANKRUPTCY; CUSTODY OF CHILD; DIVORCE; MARRIAGE SETTLEMENT, 2; TRUSTEE.

HYPOTHECATION. — See BOTTOMRY BOND.

IMPLIED WARRANTY. — See WARRANTY.

INDICTMENT. — See CONSPIRACY.

#### INFANT.

Plaintiff loaned the defendant, a minor, and his mother £150, part of which was expended for necessaries for the minor. As security for the repayment of said sum, the mother undertook to convey her life interest, and the minor his reversionary interest, in some property to plaintiff. On the minor attaining twenty-one, plaintiff brought an action against him for an account of moneys spent for necessaries; and asked that the amount so found might be declared a lien on the defendant's reversion. The account, with an order for repayment, was allowed, but the deed was declared not binding on the defendant. — *Martin v. Gale*, 4 Ch. D. 428.

INFRINGEMENT. — See COPYRIGHT.

#### INNKEEPER.

Defendant R. kept a hotel, and under the same roof a refreshment bar and counter, where passers could obtain drink. Prosecutor was a neighbor, and had a way of coming to the bar with his dogs, to the annoyance of the guests, who complained. The proprietor requested him to keep his dogs away. Subsequently he came into the bar with a big dog, and asked for refreshments, which were refused him. He had the innkeeper indicted for refusing to furnish

refreshments. *Held*, that the indictment could not be maintained, as the bar was not an inn, and the prosecutor was not a traveller; and, moreover, that his conduct in annoying the guests with his dogs was sufficient ground for the defendant to refuse to entertain him. — *The Queen v. Rymer*, 2 Q. B. D. 136.

#### INSURANCE.

The question was, whether, in a valued policy on freight, the freight meant was the whole freight, or the balance after deducting certain advances that had been made. *Held*, that the rule, that in a valued policy the question of the valuation cannot be gone into, did not preclude an inquiry into the above question. Rule that a marine policy may be ratified after notice of loss, affirmed. — *Williams et al. v. The North China Insurance Co.*, 1 C. P. D. 757.

INTENTION. — See CLASS; EMBEZZLEMENT, 1.

JOINT TENANT. — See APPOINTMENT.

#### JURISDICTION.

1. Plaintiffs, a limited company, with a registered office in London, sued defendants, also a limited company registered in London, for the rent of property in the Argentine Republic. Defence, that both companies were domiciled in the Argentine Republic; that the property in question was situated on land of the Republic, and both companies were *concessionaires* thereof; that as the claim related to immovable property in a foreign country, there could be no jurisdiction, without great inconvenience in the investigation of the matter in dispute, and without a violation of international comity. *Held*, on demurrer, that the defence was invalid. — *The Buenos Ayres & Ensenada Port Ry. Co. v. The Northern Ry. Co. of Buenos Ayres*, 2 Q. B. D. 210.

2. The prisoner was a German, and captain of a German ship, which ran into a British steamer about two miles off Dover pier-head. In consequence of the collision a female passenger on the steamer was drowned. On indictment for manslaughter on the high seas, and within English admiralty jurisdiction, in the Central Criminal Court the jury found the prisoner guilty. The question reserved for the court was, whether the court had jurisdiction, as the prisoner was a foreigner, in a foreign vessel, on a foreign voyage, and sailing on the high seas. The crown maintained jurisdiction, on the ground that, at the time of the collision, both vessels were within three miles of the English shore. *Held*, by a divided court, seven to six, that the Central Criminal Court had no jurisdiction. (The opinions of the judges are elaborate, and cover nearly two hundred pages.) — *The Queen v. Keyn*, 2 Ex. D. 63; s. c. 2 Q. B. D. 90.

LACHES. — See MORTGAGOR AND MORTGAGEE, 1.

#### LANDLORD AND TENANT.

W. made an agreement in writing, not under seal, with B., by which W. undertook to demise to B. a certain messuage as tenant from year to year, so long as B. paid the rent, and W. had power to let the premises. The rent was below the market rate. B. paid his rent quarterly. *Held*, in a suit by W. against B. for possession, that the instrument was not a lease, on the ground

of uncertainty, and as not conforming to the Statute of Frauds and the 8 & 9 Vict. c. 106. The defendant had only a tenancy from year to year. — *Wood v. Beard*, 2 Ex. D. 80.

**LATENT DEFECT.** — See **WARRANTY**.

#### **LEASE.**

In the *habendum* of a lease executed in 1784, the term mentioned was 94½ years, in the *reddendum*, 91½. In the counterpart of the lease executed by the lessee both the *habendum* and the *reddendum* had 91½. *Held*, overruling the Common Pleas that there was a plain clerical error, — that the “94” must be rejected, and the lease be construed as for 91½ years. — *Burchell v. Clark*, 2 C. P. D. 88; s. c. 1 C. P. D. 602; 11 Am. Law Rev. 284.

See **LANDLORD AND TENANT**; **SPECIFIC PERFORMANCE**.

#### **LIBEL AND SLANDER.**

1. The medical officer of a workhouse in a small country district is not a person of sufficient consequence to the whole country to constitute the publication by a *Manchester* daily paper of certain proceedings of the guardians of said workhouse, reflecting upon said medical officer, privileged. Neither is the workhouse of sufficient importance to the country at large to render such an article privileged. — *Purcell v. Souler et al.*, 1 C. P. D. 781.

2. The defendant was an expert in handwriting, and gave evidence in a will case, to the effect that the signature was a forgery. In another case, where defendant was on the stand, allusion was made by counsel to some remarks of the judge disparaging to the witness in the will case, and the defendant, though forbidden by the judge to allude further to the will case, insisted on saying, “I believe that will to be a rank forgery,” &c. *Held*, that the privilege of a witness extended to cover this case, as the remark was made by witness in defence of his own credit as an expert. — *Seaman v. Netherclift*, 2 C. P. D. 53; s. c. 1 C. P. D. 540; 11 Am. Law Rev. 290.

#### **LIEN.**

A solicitor in a suit in bankruptcy employed by the trustee is entitled to retain papers on which he has expended labor or his own money, as security for his fees. — *Ex parte Yalden*. *In re Austin*, 4 Ch. D. 129.

See **VENDOR AND PURCHASER**, 8.

**LIMITATION OF LIABILITY.** — See **COMMON CARRIER**.

**LIMITATIONS, STATUTE OF.** — See **STATUTE OF LIMITATIONS**.

**MARINE INSURANCE.** — See **INSURANCE**.

**MARKET VALUE.** — See **DAMAGES**.

**MARRIAGE.** — See **WILL**, 2.

#### **MARRIAGE SETTLEMENT.**

1. J., on occasion of his second marriage, made a settlement of a piece of land upon trust for himself and his second wife, during their joint lives, and the life of the survivor, remainder to his son by a former marriage, T., absolutely. The wife's property was at the same time settled to her separate use,



with power of appointment, and in default of appointment to her children born or to be born. J. sold the land to the plaintiff. *Held*, that, in the marriage settlement, the provision for the son was a purely voluntary one, and not valid against a purchaser of the property for consideration. — *Price v. Jenkins*, 4 Ch. D. 483.

2. S. and wife had a power of appointment over real estate in favor of their children. They had six children; and, on the eve of marriage of one daughter, an agreement was made between S. and his wife, and the daughter and the intended husband, by which the parents agreed to appoint a portion of the property to the daughter in consideration of the marriage; and the intended husband agreed that he would "settle such share as" his wife should receive, to her use, with power of appointment, remainder to himself, and ultimate remainder to the children of the marriage. S. survived his wife, released his power of appointment, and gave a portion of the interest in the property after his death to said daughter. The daughter died, leaving two infant children, and before her husband had taken any steps to carry out the "settlement" proposed in the agreement made at the time of the marriage. The question was whether the marriage agreement was binding on the wife, and consequently on the oldest child, her heir at law. *Held*, that although the husband, by that agreement, engaged to settle what was not his, but his wife's, yet the wife would be bound by it, on the ground that she had assented to her father's arrangement, and hence it was also binding on her heir, and must be carried out. — *Lee v. Lee*, 4 Ch. D. 175.

MASTER AND SERVANT.— See EMBEZZLEMENT, 2.

MEASURE OF DAMAGES.— See DAMAGES, 1, 2.

MISDESCRIPTION.— See DEED.

MISTAKE.— See SALE.

#### MORTGAGOR AND MORTGAGEE.

1. S. H., tenant for life in leasehold property under a will, began proceedings for administration in 1859. In 1859 and 1860 she mortgaged her life interest. The same year the mortgagee entered under an order, received the rents for the interest, and paid the balance to the tenant for life. March 25, 1866, S. H. left her home, and was never heard of again. In 1875, the remaindermen under the will petitioned to have the leasehold sold, and the proceeds paid to them. For the purposes of that petition it was decided that S. H. must be considered to have died soon after June, 1866. On a petition by the remaindermen for arrears of rent from the mortgagee, *held*, that they were entitled to only six years' rent to the date of the petition, as there was no relation of trust between the mortgagee and them, and that there was no laches on their part in not filing the petition before the expiration of seven years from the disappearance of S. H. — *Hickman v. Upsall*, 4 Ch. D. 144.

2. E., a trader, made a mortgage conveyance to one P. of all his stock of upholstery goods in his shop in D. Street, and in the same deed of all his household furniture in his house in S. Street. There was a power in the deed for the mortgagee at any time to take and retain possession of the property. At 9.25 A.M. on June 28, 1876, P. took possession of the shop and contents.

At 10 A.M. of the same day E. filed his petition for liquidation, but without notice to P. On the afternoon of the same day, and after he had notice of the petition, P. took possession of the furniture in S. Street. *Held*, that P. was entitled to the furniture as well as the stock in trade, as against the liquidator. — *In re Eslick. Ex parte Phillips. Ex parte Alexander*, 4 Ch. D. 496.

3. W. deposited with C. certain bonds to secure a loan. C. filed a bill for foreclosure or sale. *Held*, that the doctrine of equitable mortgage of real estate by deposit of title-deeds cannot be extended to authorize a pledgee of personal property to foreclose. He can only have an order of sale. — *Carter v. Wake*, 4 Ch. D. 605.

See DOWER; FIXTURES.

#### MORTMAIN.

Commissioners under the act to supply the town of A. with pure water were authorized to purchase land, construct gas and water works, and to levy rates upon occupiers, and recover by distress; and the works as well as the soil were vested in them. They were also authorized to borrow money, and they made mortgages of the "works, rents, and rates" as security for the sums borrowed. P. left £400 in these securities by will to a charity. *Held*, that the form of mortgage conferred on the holder an interest in land, and hence that the securities came within the statute of mortmain. — *Chandler v. Howell*, 4 Ch. D. 651.

NECESSARIES. — See INFANT.

#### NEGLIGENCE.

1. A railway train stopped at a station in such a way that the engine and part of the first car stood beyond the platform. A female passenger who wished to get down waited some time on the car-step for assistance, but finally, fearing the train would start, tried to alight alone. She had her hands encumbered with parcels, and fell and injured herself. On these facts, *held*, that there was sufficient evidence of negligence on the part of the railway company to go to the jury. — *Robson v. The North Eastern Railway Co.*, 2 Q. B. D. 85.

2. A train on defendant's railway, on which plaintiff was a third-class passenger, ran by at a station, so that the car on which plaintiff was, shot beyond the platform. Defendant's servants called out to the passengers to keep their seats, but plaintiff and others in the same car did not hear them. After a while, on the advice of a friend, and seeing passengers from other cars descending, plaintiff, with some one's help, descended. In so doing she was injured. *Held*, that there was evidence of negligence on the part of the defendants to go to the jury. — *Rose v. The North Eastern Railway Co.*, 2 Ex. D. 248.

See COLLISION, 1.

#### NEGOTIABLE INSTRUMENT.

Plaintiff placed certain scrip certificates in the hands of a broker, for the purpose of having the instalments paid on them according to their tenor, and finally of converting them into stock. A usage was proved that among bankers and brokers such certificates were transferable by mere delivery. The broker made them over to the defendant for a debt of his own, and the defendant received them in good faith as his property. *Held*, that the defendant was entitled to them as against the plaintiff, the latter being estopped to

deny that the certificates were transferable by delivery. — *Rumball v. The Metropolitan Bank*, 2 Q. B. D. 194.

NOTICE. — See PRINCIPAL AND AGENT, 1.

#### PARTNERSHIP.

H., a banker, took in K. as a member of the firm, the latter furnishing no capital, and having nothing to do with the conduct of the business. H. engaged secretly in speculations, drew money from the bank fraudulently, and manipulated the books to conceal his performances, lost in his ventures, and finally committed suicide. K. left all his supposed profits in the bank, and on H.'s death he had to go into bankruptcy. In the administration proceedings on H.'s estate the trustee in bankruptcy of K. presented a claim for H.'s fraudulent overdrafts. *Held*, that the claim should be allowed. — *Lacey v. Hill*, 4 Ch. D. 537.

PASSENGER. — See COMMON CARRIER.

#### PATENT.

Case of insufficiency of specification in the matter of a lamp-burner. Description and accompanying figure did not agree. — *Hinks v. Safety Lighting Company*, 4 Ch. D. 607.

PERIOD OF DISTRIBUTION. — See DISTRIBUTION.

#### PETITION OF RIGHT.

A sum of \$3,000,000 was received by the British government from China on account of debts due British merchants from bankrupt Chinese merchants. *Held*, that a petition of right by a claimant of a portion of this sum would not lie, and that by virtue of a treaty with a foreign power the crown can never be a trustee or agent of a subject. — *Rustomjee v. The Queen*, 2 Q. B. D. 69; s. c. 1 Q. B. D. 487; 11 Am. Law Rev. 288.

#### PLEADING AND PRACTICE.

The court will not decide on a fictitious case, where the parties who would be affected by it are not *in esse*, and may never be, and when such decision would not be binding, and might cause trouble which would never arise unless the persons not now *in esse* should come into being. — *Bright v. Tyndall*, 4 Ch. D. 189.

See CONSPIRACY; FOREIGN JUDGMENT; JURISDICTION, 1, 2.

PLEDGE. — See MORTGAGOR AND MORTGAGEE, 3.

POSSESSION. — See MORTGAGOR AND MORTGAGEE, 2; VENDOR AND PURCHASER, 1.

POWER OF APPOINTMENT. — See APPOINTMENT.

PREFERENCE. — See FRAUDULENT PREFERENCE, 3.

PRESUMPTION OF DEATH. — See MORTGAGOR AND MORTGAGEE, 1.

#### PRINCIPAL AND AGENT.

1. A broker sold Consols which were trust property for cash, received the amount by check from the trustee who employed him, and deposited the check

in his bank. At the same time, he bought with the proceeds of the Consols railway stock, which could only be transferred on the settling-day, two days later. He had notice that the Consols were trust property. On settling-day he failed, and there was a sum at his bankers to his credit. *Held*, that the proceeds of the Consols could be traced and claimed as being trust property, and that the trustee thereof need not come in merely as a general creditor. — *Ex parte Cooke. In re Strachan*, 4 Ch. D. 123.

2. Plaintiff offered to sell his colliery for £25,000 net. Defendant thought he could sell it for him, and after some correspondence plaintiff wrote defendant that if the latter could sell his colliery for £30,000, defendant might retain the extra £5,000. Defendant, on inquiries, thought the colliery could be sold for more, and entered into negotiations with one C., a law student, without means, and as a result C. got a purchaser at £40,000. The transaction was carried through; the plaintiff received £25,000, believing, as alleged, that the property brought only £30,000, defendant got £5,000, and C. £10,000. The evidence before the Vice-Chancellor was very voluminous and conflicting, and the Vice-Chancellor held, on his view of it, that the defendant and C. were jointly and severally liable to the plaintiff for the £10,000. On appeal, *held*, without hearing appellant's counsel, by the court (JAMES, L. J., BAGGALLAY, J. A., and LUSH, J. A.), that the transaction was perfectly legitimate, and that the plaintiff's bill must be dismissed with costs. — *Morgan v. Elford*, 4 Ch. D. 352.

See BROKER; SET-OFF; SHIPPING AND ADMIRALTY.

#### PRINCIPAL AND SURETY.

Defendant, D., contracted with plaintiffs for their surplus ammoniacal liquor. The amount was to be measured at the end of each month, and payment made within the next fourteen days, unless the plaintiffs allowed a longer time. P. and C. became D.'s sureties on this contract. He paid part of his July account, and, August 21, plaintiffs took his promissory note for the balance. He did not pay the August nor September dues. *Held*, that the sureties were discharged as to the amount for which the promissory note was taken, but not for the August and September dues. The contract was separable. — *The Croydon Commercial Gas Company v. Dickinson et al.*, 2 C. P. D. 46.

PRIVILEGE. — See LIBEL AND SLANDER, 1, 2.

PRIVITY. — See TELEGRAPH.

#### PROBATE.

J. made his will, and then married. On the wedding-day he added a codicil, making provision for his wife. She died before him. On his death only the will without the codicil could be found. He had been heard to say, just before his death, that he adhered to his will, and it was supposed he destroyed the codicil, with the idea that the will would be good without it. The will as proved by the original draft, with the codicil, was admitted to probate as the last will of the deceased. — *James et al. v. Shrimpton et al.*, 1 P. D. 431.

See WILL, 2.

PROFITS. — See COMPANY, 2.

RAILWAY. — See NEGLIGENCE, 1, 2.

RATIFICATION. — See INSURANCE.

REALTY AND PERSONALTY. — See MORTMAIN.

RIGHT OF WAY. — See WAY.

RIGHT, PETITION OF. — See PETITION OF RIGHT.

#### SALE.

Blenkiron & Son, a well-known firm, did business at 128 Wood Street. One A. Blenkarn ordered goods, by letter, of the plaintiffs, from 87 Wood Street. The letters were signed in such a manner that the signature looked very much like A. Blenkiron & Co. A. Blenkarn had been convicted under an indictment for falsely pretending, in obtaining these goods, that he was Blenkiron & Son. Meantime the defendants had bought in good faith some of the goods of Blenkarn. *Held*, that there was no contract between the plaintiffs and A. Blenkarn by reason of mistake, and that the property in the goods never passed to A. Blenkarn. — *Lindsay et al. v. Candy et al.*, 2 Q. B. D. 96; s. c. 1 Q. B. D. 848.

See BANKRUPTCY; CONTRACT, 4; CONVEYANCE.

#### SALVAGE.

1. The crews of a pilot cutter and three boats, all of the Scilly Islands, saved ten of the passengers of the German steamship *Schiller*. Subsequently, some of the specie on the *Schiller* was recovered by divers, and the owners, masters, and crews of the cutter and boats made a claim for salvage out of said specie. *Held*, that they were entitled. — *The Cargo ex Schiller*, 1 P. D. 478.

2. Claim for distribution of salvage by certain of the crew of steamship N. against the owners thereof, for towing into port the steamship R. Answer, admitting the service and receipt of salvage money by the owners, but setting up a settlement by deed with the plaintiffs after the service was performed, but before the salvage money had been paid by the R. *Held*, on demurrer, that the defence was not good under the Merchant Shipping Acts of 1854 and 1862. — *The Rosario*, 2 P. D. 41.

3. Steamer M., from Sumatra to Jedda, with five hundred and fifty pilgrims, was wrecked on the Parkin Rock in the Red Sea, two or three days' voyage from Jedda. The steamer T. came up, and her captain refused to take the M.'s passengers to Jedda for less than £4,000, the whole amount of the passage-money from Sumatra to Jedda. The captain of the M. at last agreed to this. *Held*, that the bargain was inequitable, and could not be enforced. An award of £1,800 was affirmed. — *The Medina*, 2 P. D. 5; s. c. 1 P. D. 272; 11 Am. Law Rev. 290.

#### SET-OFF.

H. bought iron of A. & Co., supposing and having reason to believe that he was dealing with A. & Co., as principals, when in fact they were factors or agents of D. As result of other transactions, A. & Co. became indebted to H. for an amount larger than the price of the iron. H. then went into

liquidation, and D. tried to prove his claim for the price of the iron. *Held*, that H. was entitled to set off the amount due him from A. & Co. — *Ex parte Dixon*. *In re Henley*, 4 Ch. D. 133.

#### SHIPPING AND ADMIRALTY.

D. and the defendants were joint owners of a steamship, which D., as managing owner, sold through the plaintiffs, and received in payment a bill of exchange, which was duly paid. Afterwards plaintiffs drew upon D. for their commission. D. accepted the draft, but before its maturity went into bankruptcy. At the time of the sale the plaintiffs did not know that the defendants were part owners, but their assent to the transfer was afterwards obtained, together with an acknowledgment that "we have agreed to sell the steamship, and have actually received the purchase-money." *Held*, that the jury properly found that the sale was authorized by defendants, or at least sufficiently ratified by them to make them liable for the commission, and that the fact that plaintiffs drew upon D. a bill for the amount of commission, which was accepted, but not paid, did not alter the matter. — *Keay et al. v. Fenwick et al.*, 1 C. P. D. 745.

See BOTTOMRY BOND; CHARTER-PARTY; COLLISION, 1, 2, 3; ENGLISH CHANNEL; GENERAL AVERAGE; JURISDICTION, 2; SALVAGE, 1, 2, 3.

SLANDER. — See LIBEL AND SLANDER.

#### SPECIFIC PERFORMANCE.

Grant by plaintiff to defendants on their application of the "seam of coal called the S. vein, and being about two feet thick, with the overlying and underlying beds of clay on and under the farm called L.," &c., for a certain term, at a certain rent, with certain royalties on coal and clay mined, with liberty in the lessees to take any part of the farm for the same term, and an obligation on them to lay out a certain sum on a manufactory and works. "Way-leave for foreign clay and coal 1d. per ton." Defendants, one of whom was a mining engineer, entered and searched for coal and clay, and reported that they did not find the coal seam, and the clay was very poor, and that they must give up the whole thing. *Held*, that they were bound to specific performance, there being no warranty by the plaintiff that the coal vein was there. — *Jefferys v. Fairs*, 4 Ch. D. 448.

See VENDOR AND PURCHASER, 2.

SPECIFICATIONS. — See PATENT.

#### SPIRITUALISM.

The appellant gave "séances," at which there were various "manifestations," such as raps, winding up and playing musical boxes, &c., attributed by appellant to spirits. He was convicted as a rogue and vagabond, under a statute concerning persons "using any rabble craft, means, or device, by palmistry or otherwise, to deceive or impose on any of his Majesty's subjects." *Held*, that the conviction was valid. — *Monck v. Hilton*, 2 Ex. D. 268.

STATUTE OF FRAUDS. — See BROKER; DEED; LANDLORD AND TENANT.

STATUTE OF LIMITATIONS. — See MORTGAGOR AND MORTGAGEE, 1.

STOCK EXCHANGE. — See CONSPIRACY; FRAUDULENT PREFERENCE.

#### TELEGRAPH.

*Held*, affirming *Playford v. United Kingdom Electric Telegraph Co.*, L. R. 4 Q. B. 706, and contrary to American cases, that an action cannot be maintained against a telegraph company by the receivers of a telegram for negligence in the delivery thereof, in consequence of which negligence the receivers suffer damage. — *Dickson v. Reuter's Telegraph Co.*, 2 C. P. D. 62.

TENANT IN COMMON. — See APPOINTMENT.

TERRITORIAL WATERS. — See JURISDICTION, 2.

TIME. — See CHARTER-PARTY; PRINCIPAL AND SURETY.

TRADE. — See COVENANT.

TREATY. — See PETITION OF RIGHT.

TRUST. — See EXECUTORS AND ADMINISTRATORS.

#### TRUSTEE.

1. Testator stated that he desired his wife and all his children should be supported from a certain farm, to be carried on by her for that purpose; that upon her death all his property should be divided among all his said children; that the personal property of his children by a former wife should be brought into hotchpot, so as to form a common fund. He then appointed his wife and her two brothers, W. and R., executors and trustees, with power to manage and conduct his affairs, and every thing relating to his real and personal property, for the benefit of his family, in their discretion, with power of sale of real estate. He directed his said executors to carry on the farm out of the assets, for the maintenance of his wife and children, and that, subject to said provision for maintenance, all his personal and real estate, and the proceeds thereof, should be held in trust for all his children. The interest of each child was to become vested on its attaining twenty-one. *Held*, that, after the death of the widow, the surviving trustees could give a good title to real estate under the will. — *In re Cooke's Contract*, 4 Ch. D. 454.

2. Testator gave property to trustees to "pay, apply, and dispose" the annual income for the maintenance and support of his son S., and his present or future wife, and of "all and every or any of his children," who being sons should be under twenty-one, or being daughters should be under twenty-one and unmarried, "in such manner and such parts, shares, and proportions as said trustees should in their discretion think fit and proper, and without being answerable or accountable to any person or persons whomsoever for the way in which" they should apply the income, and after the decease of his son to pay and apply such income "in like manner unto and for the benefit of any widow whom he shall leave, for her life, and any such child or children as aforesaid." Testator died in 1847. The son S. died in 1849. In 1851, his widow married again, but the husband and wife had separated. On a suit by the husband to have his wife's income declared payable to him, *held*, that the trustees could in their discretion pay the income to the wife, as they had done. — *Austin v. Austin*. *Austin v. Boyce*, 4 Ch. D. 233.

## ULTRA VIRES.

A company, with 150,000 shares at £10, one-half paid in, found its affairs crippled, and a part of the shareholders dissatisfied and desiring to wind up the company. After various propositions had been made, designed to improve the company's condition, the directors voted to purchase at the market rate the shares — not exceeding 100,000 — of those shareholders who were dissatisfied. At an extraordinary meeting of shareholders, this proposal was adopted, and it was provided that the shares so bought should not be reissued, except on the authority of an extraordinary meeting of shareholders. The plaintiff was a small shareholder, and opposed this scheme; and the shareholders' meeting voted that his shares be forfeited, under a clause in the articles of association, by which the shares of a shareholder who began or threatened any suit against the company or the directors should be forfeited, he being tendered the market value of his shares. The company was without power under its articles of association to deal in its own shares, and under the Companies' Act 1867, without authority to reduce its number of shares, without certain formalities, which were not resorted to. *Held*, that the plan was *ultra vires* and void, and the clause of forfeiture for threatening or bringing suit against the company or the directors was invalid. — *Hope v. International Financial Society*, 4 Ch. D. 327.

VALUED POLICY. — See INSURANCE.

## VENDOR AND PURCHASER.

1. By agreement, dated March 5, 1868, plaintiffs were to purchase certain premises of defendants. It was agreed that the purchase should be completed and possession given Sept. 29, 1869; that previous to that date all outgoings should be paid by the vendors, after that date all rents and profits should be received by the purchasers, and the latter should pay interest on a fixed sum from Sept. 29, 1867, to the completion of the purchase. The purchase was not completed, through no fault of the purchasers, until March 13, 1876. The payments of purchase-money and interest were completed on that date. The purchasers got possession April 8, 1876. *Held*, that the vendors were liable for "rents and profits" from Sept. 29, 1869, to April 8, 1876. — *Metropolitan Railway Co. v. Defries*, 2 Q. B. D. 189.

2. By marriage settlement, real estate was granted to trustees to such use as C. and wife should appoint; in default of appointment, to pay the income to the wife, remainder to C. and his heirs and assigns. Plaintiff bargained for the real estate of C., and in the contract it was stated that the premises "are now settled to such uses as the vendor and his wife shall jointly appoint, and the vendor will procure a proper assurance to be executed by all proper parties." Consols were purchased by the plaintiff and put in the name of the trustees as purchase-money of the estate, but before the conveyance deeds were signed the wife died. The plaintiff brought an action for specific performance of an agreement in the form of an appointment by C. and his wife, that having been the form of conveyance agreed upon. *Held*, that the plaintiff could have compensation out of the funds purchased and placed by him in the hands of the trustees. — *Barker v. Cox*, 4 Ch. D. 464.

3. The trustee of a projected company agreed with A. that as soon as the



company was formed it should buy A.'s lease of a brick-field for £8,000, — £6,000 cash, and £2,000 in paid-up shares in the company. The agreement was adopted by the company, and the deed of assignment recited that the consideration was £8,000, to be paid as follows; viz., fifty per cent of all sums received or to be received by the company for shares, and fifty per cent upon all money by way of capital to be at any time borrowed by it, until the payments so made should amount to the said £8,000. Subsequently, 1,000 paid-up shares were assigned to A. The company never received any money in the ways named in the deed, and no more shares were ever sold. On winding up, *held*, that A. had no vendor's lien on the lease. — *In re Brentwood Brick & Coal Co.*, 4 Ch. D. 562.

See CONTRACT, 3; CONVEYANCE; PRINCIPAL AND AGENT, 2; WARRANTY.

VOLUNTEER. — See MARRIAGE SETTLEMENT, 1.

WAGER. — See CONTRACT, 2.

#### WARRANTY.

Plaintiff bought of defendant a pole for his phaeton. The pole broke short off, by the swerving of the horses in driving, and the horses were damaged. The jury found that the pole was not reasonably fit for the carriage, and that the defendant was not guilty of any negligence; and awarded as damages the value of the pole. *Held*, on appeal, that the defendant was liable on an implied warranty that the pole was fit and proper for the specific purpose for which it was sold, and that the warranty extended to latent defects, and that the injury to the horses should be taken into account in awarding damages, in case the jury should find on a second trial that such injury was a natural consequence of the defect in the pole. *Readhead v. Mid. Ry. Co.*, L. R. 4 Q. B. 379; commented on. — *Randall v. Newson*, 2 Q. B. D. 102.

See SPECIFIC PERFORMANCE.

#### WAY.

M. had a right of way, for agricultural purposes, over an occupation road to his field. He agreed to sell the surface of his field, reserving the mines, which had, however, never been worked. The purchaser made the road unfit to use for mining purposes. *Held*, that the court would not order the obstructions in the road removed, especially as the vendor had no present intention of working the mines. — *Bradburn v. Morris*. *Morris v. Bradburn*, 3 Ch. D. 812.

WIDOW. — See DOWER.

#### WILL.

1. A testatrix attached a codicil to her will by a pin, and had the witnesses to the latter sign their names on the back of the will itself, in attestation of the codicil. *Held*, that the will and codicil be admitted to probate together. — *In the Goods of Braddock*, 1 P. D. 433.

2. B. made his will, disposing of all his property. He subsequently married, and made a second will, in which he named the same executors, but gave the bulk of his property to his wife and children in trust. Then followed a provision, that, in case there were no children living at the death of his wife, the

previous will was revived, and certain of its directions were to be carried out. The testator left a wife and child. *Held*, that the two wills should be proved together, and the first held to be incorporated in the second. — *In the Goods of Bangham*, 1 P. D. 429.

See APPOINTMENT; BEQUEST, 1, 2; CLASS; CONSTRUCTION, 1, 2; DEVISE; DISTRIBUTION; PROBATE; TRUSTEE, 1, 2.

WITNESS. — See LIBEL AND SLANDER.

#### WORDS.

“*Children.*” — See APPOINTMENT.

“*To do Justice.*,” “*Relations.*” — See BEQUEST, 2.

“*Shipped.*” — See CONTRACT, 1.

“*Cargo.*” — See CONTRACT, 4.

“*Eldest Son.*” — See CONSTRUCTION, 1.

“*Die without Issue.*” — See CONSTRUCTION, 2.

“*Inn.*,” “*Traveller.*” — See INNKEEPER.

“*Works, Rents, and Rates.*” — See MORTMAIN.

“*Palmistry.*” — See SPIRITUALISM.

## SELECTED DIGEST OF STATE REPORTS.

[For the present number of the Digest, selections have been made from the following volumes of State Reports; 51 and 52 Alabama; 15 Florida; 56 Georgia; 12 C. E. Green (New Jersey Equity); 41 and 42 Iowa; 120 Massachusetts; 63 Missouri; 56 New Hampshire; 73, 74, and 75 North Carolina; 26 and 27 Ohio State; 80 Pennsylvania State; and 40 Wisconsin; also from 93 United States.]

ABORTION. — See INSURANCE (LIFE), 1.

ACCEPTANCE. — See BILLS AND NOTES, 1.

ACCESSORY. — See LARCENY, 1.

ACCOUNT. — See TENANT IN COMMON.

## ACTION.

1. A corporation established for the maintenance of a public charitable hospital, which has exercised due care in the selection of its agents, is not liable for an injury to a patient caused by their negligence, or by the unauthorized assumption of one of the hospital attendants to act as a surgeon. — *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432.

2. A lease was made of a shop, the lessor agreeing to put up certain fixtures, which he did, but in an unsafe manner, of which he was notified by the lessee, but neglected to make the fixtures safe; and they fell upon and injured a customer of the lessee, lawfully in the shop. *Held*, that the lessor was not liable to the customer. — *Burdick v. Cheadle*, 26 Ohio St. 393.

See ASSUMPSIT; BANKRUPTCY, 3; CORPORATION, 1, 3; EASEMENT; EXECUTOR, 2; HOMESTEAD, 2; ILLEGAL CONTRACT; MARRIED WOMAN, 2; MUNICIPAL CORPORATION, 1; NUISANCE; RECEIVER; SEDUCTION; TRUST, 1.

ACTION ON THE CASE. — See EASEMENT.

ADDITION. — See INDICTMENT, 1.

ADMINISTRATION. — See EXECUTOR.

ADMIRALTY. — See DAMAGES, 5.

ADVERSE USER. — See WAY.

## ADVERTISEMENT.

A notice required by statute to be published in a newspaper, must be in a newspaper printed in the English language. — *Cincinnati v. Bickett*, 26 Ohio St. 49.

AFFINITY. — See JUDGE.

## AGENT.

One of the trustees of a church bought, on the credit of the church, materials for building a meeting-house. The other trustees had not authorized him to buy on account of the church, and he had represented to them that he would furnish the materials at his own expense. The materials were used in building the church. *Held*, that the trustees were liable for the price. — *Tull v. Trustees of M. E. Church*, 75 N. C. 424.

See CARRIER, 3; ILLEGAL CONTRACT, 3; INSURANCE (FIRE), 2.

AMENDMENT. — See LIMITATIONS, STATUTE OF.

ANIMAL. — See MALICIOUS MISCHIEF; SALE.

APPEAL. — See COSTS.

## ARREST.

1. An officer having a warrant for the arrest of A. on a charge of misdemeanor, and having reasonable cause to believe him to be in the house of B., notified the latter that he had a warrant against a person in the house, and demanded admittance, which B. refused, without inquiring or being informed who was the person sought; whereupon the officer forcibly entered the house. *Held*, that he was justified, though A. was in fact not within. — *Commonwealth v. Reynolds*, 120 Mass. 190.

2. A prisoner was brought into court on criminal process, and admitted to bail; immediately after, and before he had left the court-room, he was arrested on mesne process in a civil action. *Held*, regular. — *Moore v. Green*, 78 N. C. 394.

See CONSTITUTIONAL LAW (STATE), 5.

## ASSAULT.

A constable who arrests a drunken man without warrant, locks him up till sober, and then discharges him without taking him before a magistrate, is guilty of a criminal assault and battery. — *State v. Parker*, 75 N. C. 249.

ASSESSMENT. — See CONSTITUTIONAL LAW, 4.

## ASSUMPSIT.

Plaintiff contracted with defendant to do certain work on a building for an agreed price; while the work was in progress, the building was destroyed by fire, without plaintiff's fault. *Held*, that he could recover the value of what he had done, under a common count for work, labor, and materials. — *Cleary v. Sohler*, 120 Mass. 210.

See TRUST, 1.

ATTACHMENT. — See BANKRUPTCY, 2; EXEMPTION, 3; TAX, 2.

## ATTORNEY.

A client who has employed an attorney to bring an action, and agreed to pay him a fee out of the proceeds, cannot abandon the action without the attorney's consent, or payment of the fee. — *Twiggs v. Chambers*, 56 Ga. 279.

See JUDGMENT, 3.

## AUTREFOIS CONVICT.

The uttering of several forged checks at the same time to the same person is a single offence, and a conviction of uttering one of the checks is a bar to a prosecution for uttering another. — *State v. Egglest*, 41 Iowa, 574.

BANK. — See CONSTITUTIONAL LAW, 1, 2; EXECUTOR, 4; NATIONAL BANK.

## BANKRUPTCY.

1. Pending an action for unlawful detainer, the plaintiff obtained possession of the property sought to be recovered; afterwards the defendants became bankrupt. *Held*, no bar to the further prosecution of the action for damages and costs. — *Lomax v. Spear*, 51 Ala. 532.

2. An action was brought in a State court against a corporation, and its property attached; more than four months after, the corporation was adjudged bankrupt, and its assignees moved to dismiss the action for want of jurisdiction. Motion denied. — *Munson v. Boston, Hartford, & Erie R.R. Co.*, 120 Mass. 81.

3. Under the Bankrupt Act as originally enacted, an assignee might sue in a State court to recover the bankrupt's assets. *Quære*, since the Revised Statutes. — *Claffin v. Houseman*, 93 U. S. 130.

See CONSTITUTIONAL LAW, 2.

## BATTERY. — See ASSAULT.

BILL OF LADING. — See CARRIER, 3; CONFLICT OF LAWS.

BILL OF PEACE. — See INJUNCTION, 2.

## BILLS AND NOTES.

1. The words "I take notice of the above," written and signed upon a bill of exchange by the drawee, do not necessarily import an acceptance of it, but parol evidence is admissible to show a refusal to accept; nor does a part payment of the same bill by the drawee bind him to pay the remainder. — *Cook v. Baldwin*, 120 Mass. 317.

2. An instrument in the ordinary form of a note, containing also a promise to pay an additional sum of two per cent as an attorney's fee, if the note shall be dishonored and placed in the hands of an attorney for collection, is not a promissory note. — *First National Bank of Trenton v. Gay*, 63 Mo. 33.

See FORGERY; NATIONAL BANK; PARTNERSHIP.

## BONA FIDE PURCHASER.

A deed was delivered, as an escrow, by the grantor's attorney to the grantee's attorney; the latter promised to return it in a day or two, but wrongfully delivered it to the grantee, who had it recorded, entered upon the land, remained in possession seven months, and then conveyed to a *bona fide* purchaser. *Held*, that the latter had a good title against the original grantor. — *Haven v. Kramer*, 41 Iowa, 382.

## BOND.

A man executed a bond as surety, and left it with the principal obligor, with the understanding that it should not be delivered until another person

had executed it as co-surety; but the principal delivered it as it stood, the bond being complete on its face, and the obligee having no notice of the understanding between the principal and the surety. *Held*, that the surety was bound. — *State v. Potter*, 63 Mo. 212.

BURDEN OF PROOF. — See EVIDENCE, 4, 5.

#### BURGLARY.

Indictment for burglary averred that the prisoner "did break and enter the S. Theatre, the property of T. A., and his place of business, with intent to commit a larceny;" but did not show that any valuable thing was in the theatre or was stolen from it. *Held*, bad. — *Lee v. The State*, 56 Ga. 477.

See INDICTMENT, 8.

BY-LAW. — See CONSTITUTIONAL LAW, 8; MUNICIPAL CORPORATION, 2, 8.

#### CARRIER.

1. A railroad undertook to transport cattle at a reduced rate, and to carry their owner; and in consideration thereof it was agreed that the owner of the cattle should care for them at his own expense, and that the carrier should not be liable for any loss beyond \$50.00 a head. *Held*, that the contract was reasonable and valid. (MANNING, J., dissenting.) — *South & North Alabama R.R. Co. v. Henlein*, 52 Ala. 606.

2. Action against a carrier for injury caused to goods by the breaking of apparatus used in their delivery. *Held*, that evidence was admissible to show a custom for the consignee to furnish such apparatus; and that, on proof of such usage, the carrier was excused, if the injury was caused by a latent defect in the apparatus furnished by the consignee. *Seem*, that, even without proof of usage, the consignee took the risk of the sufficiency of apparatus furnished by him. — *Loveland v. Burke*, 120 Mass. 139.

3. Goods were sent by an express company, the bill of lading stipulating that the company would not be liable for any loss by fire. The goods were sent, in charge of the company's messenger, in a railroad car reserved for the company's use; and were destroyed by fire through the negligence of the railroad company. *Held*, that the railroad company was the agent of the express company, and that the latter was liable as a common carrier for the loss. — *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174.

See CONFLICT OF LAWS.

CASE. — See EASEMENT.

#### CHARITY.

Devise to "the Roman Catholic orphans of the diocese," with power to the executor to sell the land and use the proceeds for the benefit of said orphans. *Held*, too uncertain for a good charitable gift; and that the court had not power to execute it *cy-près*. — *Heiss v. Murphey*, 40 Wis. 276.

See ACTION, 1; DEVISE, 3, 5.

COLLISION. — See DAMAGES, 5.

COMMON, TENANT IN. — See TENANT IN COMMON.

COMMON CARRIER. — See CARRIER.

COMMON COUNTS. — See ASSUMPSIT.

#### CONFLICT OF FEDERAL AND STATE AUTHORITY.

A State statute required foreign insurance companies, as a condition precedent to receiving a license to do business in the State, to agree not to remove into the United States courts any actions brought against them in the State courts; and enacted that in case of violation of such agreement by any insurance company, it should "be the imperative duty of the Secretary of State" to revoke its license. *Held*, (1) that the statute was constitutional; (2) that the duty of the Secretary under it was not judicial; (3) that he might be compelled to do that duty by *mandamus*, at the relation of any person interested; (4) that the United States Circuit Court could not constitutionally enjoin him from doing it, because such injunction was in effect a suit against the State. — *State v. Doyle*, 40 Wis. 176.

#### CONFLICT OF LAWS.

Goods were sent from Connecticut to Iowa, and lost by fire while in the hands of the carrier in Illinois. The bill of lading, made in Connecticut, exempted the carrier from liability for loss by fire. Such exemption was valid by the law of Connecticut and of Illinois, but not by the law of Iowa. In an action brought in Iowa by the consignee against the carrier, *held*, that the exemption was valid, and the defendant not liable. — *Talbot v. Merchants' Despatch Transp. Co.*, 41 Iowa, 247.

See EXECUTOR, 2.

CONSIDERATION. — See RATIFICATION.

#### CONSTITUTIONAL LAW.

1. The surplus capital of a national bank, in excess of the amount which it is required by the laws of the United States to keep on hand, is taxable by the State in which the bank is established. — *First National Bank v. Peterborough*, 56 N. H. 38.

2. A State statute provided that when a savings-bank should be found to be insolvent, the account of each depositor should be reduced, so as to divide the loss equitably. *Held*, that the statute did not violate the Constitution of the United States, as impairing the contract between the bank and the depositor, nor as conflicting with the Bankrupt Act; nor the Constitution of the State, as being a retrospective law. — *Simpson v. City Savings-Bank*, 56 N. H. 466.

3. Where a railroad company has a right by its charter to change the gauge of its road, the Legislature cannot afterwards require it to maintain any particular gauge. (BYNUM, J., dissenting.) — *State v. Richmond & Danville R.R. Co.*, 73 N. C. 527.

4. A city authorized by statute to improve its streets and assess the cost on the abutters, made a contract with certain persons for the doing of the work at a certain price, the contractors to receive in full payment the money raised

by assessment. *Held*, that a statute restricting the power of assessment, so that the city could not assess an amount equal to the contract price, was unconstitutional. — *Goodale v. Fennell*, 27 Ohio St. 428.

5. By treaty between the United States and an Indian tribe, the latter ceded a district to the former, and it was agreed that the laws of the United States, forbidding the sale of spirituous liquors in the Indian country, should be in force in the ceded district. This district afterwards became part of an organized county in a State. *Held*, that the provisions of the treaty still had the force of law in the district. — *Forty-three Gallons of Whiskey*, 93 U. S. 188.

6. A provision in a State Statute of Limitations, that where the defendant resides out of the State, the statute shall run against the plaintiff, if also a non-resident, but not if he is a resident, *held*, constitutional. — *Chemung Canal Bank v. Lowery*, 93 U. S. 72.

7. A statute authorized counties to levy a tax, and with the proceeds of it to subscribe for and take stock in railroad companies. A later statute required railroads so aided to issue stock to the persons who had paid such taxes, to the amount by them respectively paid; and provided that such issue should cancel *pro tanto* the stock held by the county in which the tax-payer lived, issued under the provisions of the former act. *Held*, that the last act was constitutional. — *Tippecanoe County v. Lucas*, 93 U. S. 108.

8. A city ordinance imposed a license tax on insurance companies doing business within the city. *Held*, constitutional, as applied to a company which had already been licensed by the State to do business. — *Home Insurance Co. v. Augusta*, 93 U. S. 116.

See CONFLICT OF FEDERAL AND STATE AUTHORITY; JUDGMENT, 8.

#### CONSTITUTIONAL LAW (STATE).

1. The Constitution of Alabama provides that suits may be brought against the State in such courts as may by law be provided. The Legislature made provision accordingly by a law which was afterwards repealed. *Held*, that the repeal was constitutional, and abated pending suits. — *Ex parte State of Alabama*, 52 Ala. 231.

2. A statute authorizing the common council of a city to imprison for contempt, *held*, unconstitutional. — *Whitcomb's Case*, 120 Mass. 118.

3. A statute authorizing towns to lend money to railroads, and to raise the same by levying a tax, *held*, constitutional. — *Perry v. Keene*, 56 N. H. 514.

4. Where the Constitution defines the qualifications of an elector, the Legislature cannot require other qualifications for voting at a city election. — *People v. Canaday*, 73 N. C. 198.

5. A constitutional prohibition of imprisonment for debt does not prohibit arrest in a civil action of tort. — *Moore v. Green*, 73 N. C. 394.

6. A statute enacting that destitute children, abandoned by their parents or guardians, shall be committed to industrial schools during minority, is not unconstitutional as authorizing imprisonment without due process of law. — *Milwaukee Industrial School v. Supervisors of Milwaukee County*, 40 Wis. 328.

See CONSTITUTIONAL LAW, 2; HOMESTEAD, 1.

CONTEMPT. — See CONSTITUTIONAL LAW (STATE), 2; INJUNCTION, 1.



## CONTRACT.

An assignment executed on August 31, of "all rents due and coming due until October 1st," from tenants who pay their rents on the first day of each month, includes rents falling due on October 1st. — *Kendall v. Kingsley*, 120 Mass. 94.

See ACTION, 2; ASSUMPSIT; ATTORNEY; BOND; CARRIER, 1, 3; CONFLICT OF LAWS; CONSTITUTIONAL LAW, 2, 4; DAMAGES, 1, 4; FRAUDS, STATUTE OF; HOMESTEAD, 2; ILLEGAL CONTRACT; INSURANCE; PARTNERSHIP; RATIFICATION; SALE.

## CONVERSION.

By statute, whoever converts to his own use any timber floating in the water or drifted on the shore, shall be liable to the owner thereof in treble damages. *Held*, that the statute was penal, and did not apply to a merely technical conversion, without malice or wilfulness on the part of the defendant. — *Cohn v. Neeves*, 40 Wis. 393.

CONVERSION (EQUITABLE). — See EXEMPTION, 3.

## CORPORATION.

1. A statute authorized the A. company to convey to the B. company all its franchises and property, rights, easements, privileges, and powers; and thereupon B. was to be "subject to all the duties, liabilities, obligations, and restrictions to which A. may be subject." A conveyance having been made accordingly, *held*, that B. was liable to an action for the tort of A. before the conveyance. — *New Bedford R.R. Co. v. Old Colony R.R. Co.*, 120 Mass. 397.

2. Where by statute a stockholder is personally liable for the debts of the corporation, without a previous or concurrent judgment recovered against the corporation, the creditor of the corporation who first recovers judgment against a stockholder has priority over creditors who subsequently recover judgment, though their actions were begun before his was. — *State Savings Association v. Kellogg*, 63 Mo. 540.

3. The charter of a corporation provided that, in case of insolvency, the stockholders should be personally liable to the extent of twice the amount of their stock. *Held*, that a suit to charge a stockholder must be brought by all the creditors of the corporation jointly, or by one in behalf of all, and that one creditor could not sue for himself alone. — *Von Glahn v. Harris*, 73 N. C. 323.

See CONSTITUTIONAL LAW, 3; RECEIVER; TAX, 6.

## COSTS.

A master, or other officer entitled to have fees taxed as costs in an action, cannot in his own name appeal from an order of the court retaxing the costs, or disallowing his claim for fees. — *Fieldeley v. Diserens*, 26 Ohio St. 312.

See PARDON.

COUNTY. — See CONSTITUTIONAL LAW, 7.

COVENANT. — See INCUMBRANCE.

**CRIMINAL LAW.** — See **ARREST**, 1; **ASSAULT**; **AUTREFOIS CONVICT**; **BURGLARY**; **EVIDENCE**, 3, 4; **FORGERY**; **GAMING**; **INDICTMENT**; **INTENT**; **LARCENY**; **MALICIOUS MISCHIEF**; **PARDON**; **VENUE**, 1; **VERDICT**, 1, 2; **WITNESS**, 2.

**CROPS.** — See **TENANT IN COMMON**.

**CUSTOM.** — See **CARRIER**, 2.

**CY-PRÈS.** — See **CHARITY**.

#### DAMAGES.

1. In an action for breach of an agreement to thresh grain on request, damages are not recoverable for injury to the grain, and labor and expense in taking care of it, after a request to thresh it. — *Prosser v. Jones*, 41 Iowa, 674.

2. In an action by a mortgagee against one who has injured the mortgaged property by a removal of fixtures, the defendant may show, in reduction of damages, that the plaintiff, after the injury and before action brought, sold the mortgaged property, under a power in the mortgage, for more than enough to pay his debt and all prior incumbrances. — *King v. Bangs*, 120 Mass. 514.

3. Exemplary damages may be given in an action for enticing away a servant. — *Bixby v. Dunlap*, 56 N. H. 456.

4. Defendant borrowed of plaintiff stock of a company, giving in return a memorandum that he had borrowed the stock, "drawing interest at eight per cent, to be returned on demand." The company afterwards, and before action brought, became insolvent, and its stock worthless; all its property was sold under decrees of court, and was vested in a new company. *Held*, that no right of action accrued to plaintiff during this time, he having made no demand; and that he could recover only the value of the stock at the time of demand or action brought, that is, nominal damages. — *Fosdick v. Greene*, 27 Ohio St. 484.

5. A vessel, not in fault, was lost by a collision between two other vessels, both of which were in fault. On a libel *in rem* against one only, *held*, that the full amount of the loss was recoverable. — *The Atlas*, 93 U. S. 302. *The Juniata*, *ib.* 337.

See **CONVERSION**; **DOWER**, 1; **INSURANCE (FIRE)**, 1; **INSURANCE (LIFE)**, 2; **MARRIED WOMAN**, 2.

**DEED.** — See **BONA FIDE PURCHASER**; **MORTGAGE**.

**DEFAULT.** — See **JUDGMENT**, 4.

**DEPOSIT.** — See **CONSTITUTIONAL LAW**, 2.

#### DEVISE AND LEGACY.

1. Legacy to "A. or her representatives." A. died before the testator. *Held*, that her next of kin should take. — *Brokaw v. Hudson*, 12 C. E. Green, 135.

2. A man devised to his sons, and that, if either of them should die without leaving issue, the widow of the decedent should receive one-third of the rents of the land devised to him. One of the sons was married when the will was made, and when the testator died; afterwards his wife died; he married

again, and died leaving no issue. *Held*, that his widow was entitled under the will. — *Swallow v. Swallow*, 12 C. E. Green, 278.

3. A man made his will, devising the land on which he lived, in F. township, to his executor in trust to sell, and pay over the proceeds to the public-school fund of the township, to be applied to the education of the youth of said township. After the making of the will, but before the testator died, his estate was set off to make part of a new township, called P. *Held*, that the gift was for the benefit of the youth of F. township, as it existed when the will was made, and to be divided accordingly between F. and P. — *Board of Education of Fairfield Township v. Ladd*, 26 Ohio St. 210.

4. Testator gave a legacy to "my intended wife, E. J.," married E. J., afterwards obtained a divorce from her for her misconduct, and died without revoking his will. *Held*, that there was no implied revocation, and that E. J. was entitled to her legacy. — *Charlton v. Miller*, 27 Ohio St. 298.

5. A testator, wishing to leave his estate to charitable uses, but apprehending death within a month, which would avoid the gift, was told that he might devise absolutely to some person whom he could trust to carry out his wishes, and accordingly devised to Y., who, after the testator's death, being informed for the first time of the devise and of the circumstances, said that he would do as the testator wished. *Held*, that Y. took the property as devised, free of any trust. — *Schultz's Appeal*, 80 Penn. St. 396.

See CHARITY; TRUST, 2.

#### DIVORCE. — See JUDGMENT, 2.

#### DOWER.

1. Land of K. was taken for a highway. Damages for its value, and for the injury to K.'s adjoining land, were awarded to K. and paid by agreement into the hands of another person, to abide the event of a suit between K. and W., who claimed a lien on the land. On bill filed against W. and the assignee of K., by the wife of K., *held*, that she was entitled to a share in the award, in respect of her inchoate right of dower. — *Wheeler v. Kirtland*, 12 C. E. Green, 534.

2. A wife's jointure, to be a good bar of dower at common law, must be an estate in severalty, and not in common with others. — *Grogan v. Garrison*, 27 Ohio St. 50.

#### EASEMENT.

Defendant piled logs on the edge of plaintiff's land, at the point of beginning of a way over land of a third person, which plaintiff had a right to use, whereby the way was obstructed. *Held*, that plaintiff might waive the breaking and entering, and maintain an action on the case for the disturbance of his easement. — *Carleton v. Cate*, 56 N. H. 130.

See MINE; WAY.

EJECTMENT. — See BANKRUPTCY, 1.

EMINENT DOMAIN. — See DOWER, 1.

EQUITY. — See DOWER, 1; INJUNCTION; TAX, 3.

EQUITY PLEADING. — See FORECLOSURE.

ESCROW. — See BONA FIDE PURCHASER; BOND.

ESTRAY. — See SALE.

### EVIDENCE.

1. On the issue of the mental capacity of a testator, *held*, that the fact that his father, who well knew his condition of mind, had by will given him a testamentary power of appointment, was no evidence that he was fit to exercise it. — *In re Alexander*, 12 C. E. Green, 463.

2. On the issue of a testator's sanity, any persons, though neither experts nor attesting witnesses to the will, may testify to their opinion in regard to the testator's sanity, when derived from their knowledge and observation of his appearance and conduct. (Overruling former decisions.) — *Hardy v. Merrill*, 56 N. H. 227.

3. Indictment for larceny of cattle. One count laid the property in J. S., and a second count in some person to the jurors unknown. At the trial there was evidence that J. S. had lost cattle, and no evidence that any other person had. *Held*, that a conviction on the second count only could not be sustained. — *State v. Rawlston*, 73 N. C. 180.

4. In a criminal case the burden is on the prosecution to show that the offence was committed within the period limited by law for its prosecution. — *State v. Carpenter*, 74 N. C. 230.

5. In a civil action, averments of fraud, though amounting to a charge of an indictable offence, need not be proved beyond a reasonable doubt. — *Jones v. Greaves*, 26 Ohio St. 2.

6. "The English rule that parol evidence is inadmissible to vary the terms of a written instrument does not exist in this State" [Pennsylvania]. — *Per Curiam in Kostenbader v. Peters*, 80 Penn. St. 438, 440.

See BILLS AND NOTES, 1; CARRIER, 2; DAMAGES, 2; EXECUTOR, 1; FRAUDS, STATUTE OF, 2; WAY.

EXECUTION. — See EXEMPTION, 1, 2; SATISFACTION; TAX, 6.

### EXECUTOR AND ADMINISTRATOR.

1. There is no privity between an executor and an administrator *de bonis non* of the same estate; and therefore a judgment against the one will not support an action, nor be evidence, against the other. — *Graves v. Flowers*, 51 Ala. 402.

2. An administrator appointed in Alabama, and the sureties on his bond there given, became residents of Georgia. *Held*, that they were liable to be sued in Georgia by the next of kin for a breach of the bond. *Semble*, that they would have been so liable if found within the State, though not resident there. — *Johnson v. Jackson*, 56 Ga. 326.

3. A grant of administration on the goods of J. S., while a prior grant of probate of the will of J. S. by the same court remains unrevoked, is absolutely void. — *Ryno v. Ryno*, 12 C. E. Green, 522.

4. Two executors opened a joint account with bankers, who failed and compounded with their creditors. One of the executors signed the composi-

tion on behalf of the estate. *Held*, that the debt was not released. — *De Haven v. Williams*, 80 Penn. St. 480.

See WITNESS, 1.

EXEMPLARY DAMAGES. — See DAMAGES, 3.

#### EXEMPTION.

1. When property of an insolvent firm has been taken on execution against the firm, the partners cannot either jointly or severally claim the benefit of the exemption laws to be applied to such property. — *Gaylord v. Imhoff*, 26 Ohio St. 317.

2. Where a vessel is taken on execution to enforce a lien given by statute for labor and materials supplied to her, her owner cannot claim her as exempt from execution, though he has no other property. — *Johnson v. Ward*, 27 Ohio St. 517.

3. Where a debtor sold his homestead, with the *bona fide* intention of buying another with the purchase-money, such purchase-money was *held* exempt from attachment by a creditor, in the hands of the purchaser. — *Watkins v. Blatschinski*, 40 Wis. 347.

See HOMESTEAD.

FALSE PRETENCES. — See FORGERY; LARCENY, 2.

FINE. — See INDICTMENT, 2.

FIRE. — See MUNICIPAL CORPORATION, 1; PROXIMATE CAUSE.

FIRE INSURANCE. — See INSURANCE (FIRE).

FISHERY. — See INJUNCTION, 2.

#### FORECLOSURE.

Tenant for life made a mortgage in fee. In a suit to foreclose, *held*, that the remainder-men were not proper parties, and that their rights would not be affected by a decree. — *Wilkins v. Kirkbride*, 12 C. E. Green, 93.

See TAX, 6.

FOREIGN ATTACHMENT. — See EXEMPTION, 3; TAX, 2.

FOREIGN JUDGMENT. — See JUDGMENT, 2, 3.

#### FORGERY.

A., for the purpose of defrauding B., procured C., an innocent party, to sign the name of B. to a promissory note, by falsely representing that C. was authorized by B. so to do. *Held*, that A. was guilty of forgery. — *Gregory v. The State*, 26 Ohio St. 510.

FRANCHISE. — See TAX, 6.

FRAUD. — See EVIDENCE, 5; FORGERY; LARCENY, 2.

#### FRAUDS, STATUTE OF.

1. A verbal contract for a year's service, beginning on the next day, is not within the Statute. — *Dickens v. Frisbee*, 52 Ala. 165.

2. By the terms of a verbal contract of sale of goods, the purchaser was to send for them and take them away. He went to the seller's store, took a bill

of parcels of the goods, asked if they were ready, and was told that they were, and they were pointed out to him lying in the store. In an action for goods sold and delivered, *held*, that these facts did not conclusively show an acceptance of the goods sufficient to take the case out of the Statute. — *Knigh v. Mann*, 120 Mass. 219.

3. An oral guaranty of the note of another person, given in payment of the guarantor's debt, is within the Statute. — *Dows v. Swett*, 120 Mass. 322.

#### FREEHOLD. — See JURY.

#### GAMING.

Where two play at billiards with the agreement that the loser shall pay for the use of the table, this is gaming. — *State v. Book*, 41 Iowa, 550.

GARNISHMENT. — See FOREIGN ATTACHMENT.

GRAND JURY. — See WITNESS, 2.

GUARANTY. — See FRAUDS, STATUTE OF, 3.

GUARDIAN. — See SEDUCTION.

#### HOMESTEAD.

1. A man may waive his constitutional right of homestead. — *Simmons v. Anderson*, 56 Ga. 53.

2. By the law of Iowa, a husband's contract, not consented to by his wife, to convey his homestead, is absolutely void, and cannot be specifically enforced in equity, nor can damages be recovered at law for its breach. — *Barnett v. Mendenhall*, 42 Iowa, 296.

See EXEMPTION, 3.

HUSBAND AND WIFE. — See DEVISE, 4; DOWER; HOMESTEAD, 2; JUDGMENT, 2; MARRIED WOMAN; NUISANCE.

#### ILLEGAL CONTRACT.

1. A contract was made, during the war, for the purpose of carrying on an illegal trade with the enemy. *Held*, that one party to the contract could not maintain a bill in equity against the other, for an account of resulting profits. — *Snell v. Dwight*, 120 Mass. 9. And this, though the illegality of the contract was not disclosed by the bill, nor set up in the answer. — *Dunham v. Presby*, *ib.* 285.

2. Any act punishable by law as a crime is an offence against the public, and cannot lawfully be made the subject of private compromise, except so far as expressly authorized by statute. — *Partridge v. Hood*, 120 Mass. 403.

3. A foreign insurance company which has not complied with the laws of the State in the appointment of an agent can maintain no action against the agent and his sureties on a bond given by him to the company for the performance of his duties. — *Thorne v. Travellers' Ins. Co.*, 80 Penn. St. 15.

See HOMESTEAD, 2.

IMPRISONMENT. — See ASSAULT; CONSTITUTIONAL LAW (STATE), 2, 5, 6.

#### INCUMBRANCE.

The existence of a public road over land conveyed by deed with covenant

against incumbrances is no breach of the covenant. — *Desvergers v. Willis*, 56 Ga. 515.

#### INDICTMENT.

1. The prisoner was described in the indictment as "a freedman." *Held*, surplusage, which the prosecutor was not bound to prove. — *McGehee v. The State*, 52 Ala. 224.

2. Indictment in two counts, the first charging the unlawful issuing of two "notes" each of the denomination of \$1, to circulate as money, *contra formam statuti*. The second count was the same, except that the word "scrip" was used instead of "notes." The jury found the prisoner guilty on both counts, and assessed the same fine on each (the amount of the fine being left by law to their discretion). *Held*, that the indictment charged but one offence, and that judgment should be rendered for one fine only. — *State v. James*, 63 Mo. 570.

3. Indictment for breaking and entering a store-house with intent to steal the goods therein, *held*, to charge no offence at common law. — *State v. Dozier*, 73 N. C. 117.

See BURGLARY; EVIDENCE, 8; VERDICT, 2.

INFANT. — See INTENT.

#### INJUNCTION.

1. After a sale of goods, but before delivery, the seller was served with an injunction against "disposing of" them. *Held*, that a subsequent delivery was a breach of the injunction. — *Jewett v. Bowman*, 12 C. E. Green, 171.

2. Plaintiff owned an oyster-bed. Defendants took oysters from the bed, and threatened to continue doing so, under a claim of public right. They were many in number, and most of them pecuniarily irresponsible. *Held*, that they might be restrained by injunction, and that plaintiff was not confined to his remedy at law. — *Britton v. Hill*, 12 C. E. Green, 389.

See CONFLICT OF FEDERAL AND STATE AUTHORITY; TAX, 3.

INSANITY. — See EVIDENCE, 1, 2.

INSOLVENCY. — See CONSTITUTIONAL LAW, 2.

#### INSURANCE (FIRE).

1. A partnership caused their stock in trade to be insured by policy conditioned to be void "if this policy or any interest therein shall be assigned." One partner retired from the firm, and assigned to the others all his interest in the stock and the policy; afterwards a loss happened. *Held*, (1) that the policy was not avoided; (2) under the Code, requiring actions to be brought by the real party in interest, that the remaining partners might sue on it without joining the retired partner; (3) that they might recover for the whole loss, and not merely to the extent of their interests before the change in the firm. — *West v. Citizens' Ins. Co.*, 27 Ohio St. 1.

2. If a man obtains insurance on goods, "his own or held by him in trust or on commission," in a certain building, the goods themselves, and not merely the insurer's interest in them, are covered. — *Johnson v. Campbell*, 120

Mass. 449. So if the words of the policy be, "his own or held by him in trust, or in which he has an interest or liability." — *Home Ins. Co. v. Balto. Warehouse Co.*, 93 U. S. 527.

See CONFLICT OF FEDERAL AND STATE AUTHORITY; CONSTITUTIONAL LAW, 8.

#### INSURANCE (LIFE).

1. No action can be maintained on a policy of insurance on the life of a woman who dies from the effect of an illegal operation, which she voluntarily undergoes, knowing it to be dangerous to life, with intent to cause an abortion, without any justifiable medical reason. — *Hatch v. Mutual Life Ins. Co.*, 120 Mass. 550.

2. The life of a resident of Mississippi was insured by a New York corporation, in 1851, by policy conditioned to be void if the annual premium should not be regularly paid. The insured died in 1862, the premium for the previous year not having been paid, by reason of the war. *Held*, (1) that the policy was forfeited, and that the breach of condition was not excused by the existence of the war; but (2) that the equitable surrender value of the policy at the time of the breach might be recovered. (CLIFFORD and HUNT, JJ., dissenting on the first point, and WAITE, C. J., and STRONG, J., on the second.) — *New York Life Ins. Co. v. Statham*, 93 U. S. 24.

See CONFLICT OF FEDERAL AND STATE AUTHORITY; CONSTITUTIONAL LAW, 8.

#### INTENT.

Indictment for unlawfully voting, not being of full age. *Held*, that if the prisoner, when he voted, though in fact an infant, *bona fide* believed that he was of full age, he was not guilty. — *Gordon v. The State*, 52 Ala. 308.

See CONVERSION.

INTEREST. — See NATIONAL BANK.

JOINT TORTFEASORS. — See DAMAGES, 5.

JOINTURE. — See DOWER, 2.

#### JUDGE.

A judge refused to hear a cause, on the ground that he was disqualified by affinity to a party. *Held*, that this was a matter to be determined by his own discretion, and that he could not be compelled by *mandamus* to hear the cause. — *State v. Van Ness*, 15 Fla. 317.

#### JUDGMENT.

1. Judgments rendered in the courts of Alabama during the war, in cases between private persons, involving no question on the Constitution or laws of the United States, *held*, valid and binding. (Overruling former decisions.) — *Riddle v. Hill*, 51 Ala. 224; *Tarver v. Tankersley*, *ib.* 309; *Powell v. Young*, *ib.* 518; *Parks v. Coffey*, 52 Ala. 32.

2. A man was married in New Jersey, went to Illinois, leaving his wife behind him, and there obtained a decree annulling the marriage, after notice given by publication, without any actual notice to his wife, though he well knew where she was, and might have given her notice. *Held*, that the decree



was not binding on her, and that she might show that it was obtained by false evidence. — *Doughty v. Doughty*, 12 C. E. Green, 315.

3. An action was brought in Arkansas in 1856, against a citizen of Ohio, who appeared by attorney duly authorized, and pleaded to issue; in 1861, after the State had seceded, the action was tried, the same attorney defending it, and judgment rendered for the plaintiff. In an action on the judgment, brought in Ohio, *held*, (1) that the judgment was not entitled to full faith and credit, as that of the court of a State; (2) that it was void, as the judgment of a court created by unlawful authority; (3) that the attorney had not authority to submit to the jurisdiction. (ASHBURN, J., dissenting.) — *Pennywoit v. Foote*, 27 Ohio St. 600.

4. Judgment by default for want of a plea, before the time for pleading is out, is an irregularity, but not a nullity; and therefore the court by which it was rendered can set it aside during the same term, but not afterward. — *Salter v. Hilgen*, 40 Wis. 363.

See AUTREFOIS CONVICT; EXECUTOR, 1, 3; FORECLOSURE; INDICTMENT, 2; SATISFACTION.

JUDICIAL SALE. — See TAX, 6.

JURISDICTION. — See BANKRUPTCY, 1, 2, 3; EXECUTOR, 2; JUDGE; JUDGMENT, 1, 2, 3; REMOVAL OF SUITS.

#### JURY.

A statute required that jurors should be freeholders. *Held*, that a freehold to satisfy the statute might be either legal or equitable, and therefore that a mortgagor in possession was a competent juror. — *State v. Ragland*, 75 N. C. 12.

LANDLORD AND TENANT. — See ACTION, 2.

#### LARCENY.

1. A statute abolished the distinction between grand and petit larceny, and enacted that all felonious stealing should be punished as petit larceny. *Held*, that one who aided, abetted, or advised any larceny was indictable as a principal. — *State v. Gaston*, 73 N. C. 93.

2. The prisoner by false pretences induced the prosecutor to lend him money; and the prosecutor accordingly delivered to the prisoner certain bank bills as a loan, not expecting the same bills to be returned in payment; and the prisoner absconded with them. *Held*, that he was not guilty of larceny of the bills. — *Kellogg v. The State*, 26 Ohio St. 15.

LEGACY. — See DEVISE AND LEGACY.

LEX LOCI. — See CONFLICT OF LAWS.

LICENSE. — See CONSTITUTIONAL LAW, 8; MUNICIPAL CORPORATION, 2, 3.

LIEN. — See EXEMPTION, 2; MORTGAGE.

LIFE INSURANCE. — See INSURANCE (LIFE).

#### LIMITATIONS, STATUTE OF.

Actions on promissory notes are barred by statute in six years; on open accounts, in three. Plaintiff declared on a note, within three years of the

accrual of his cause of action; after those three years had expired, he amended by adding the common counts; to which defendant pleaded the limitation of three years. *Held*, a good bar. — *Lansford v. Scott*, 51 Ala. 557.

See CONSTITUTIONAL LAW, 6; EVIDENCE, 4.

LUNATIC. — See EVIDENCE, 1, 2.

#### MALICIOUS MISCHIEF.

In a prosecution under a statute borrowed from the Black Act of 9 Geo. I. c. 22, for maliciously injuring a horse, it appeared that the act was a serious injury to the horse, and done wilfully by the prisoner for purposes of gain. *Held*, that it was not necessary for a conviction that the act should appear to have been done from motives of personal malice against the owner of the horse. — *Brown v. The State*, 26 Ohio St. 176.

#### MANDAMUS.

The approval of official bonds *held* a judicial and not a ministerial duty, and therefore not compellable by mandamus. — *Ex parte Harris*, 52 Ala. 87. *Ex parte Thompson*, *ib.* 98.

See CONFLICT OF FEDERAL AND STATE AUTHORITY; JUDGE.

MARKET. — See SALE.

#### MARRIED WOMAN.

1. A statute enacted that all the property owned by a woman when married, or acquired by her afterward, should be her separate property, not liable for her husband's debts. *Held*, that by force of this statute a married woman might dispose of her separate property by will without her husband's consent, notwithstanding a former statute to the contrary not expressly repealed. — *Urquhart v. Oliver*, 56 Ga. 344.

2. Though a married woman may by statute sue alone for personal injuries suffered by her, she cannot in such action recover expenses of medical attendance; for these her husband is bound to pay. Nor can she recover for loss of time, unless she carries on a separate business; for the husband has a right to her services, and a cause of action for their loss. — *Tuttle v. Chicago, Rock Island, & Pacific Ry. Co.*, 42 Iowa, 518; and see *Mewhirter v. Hatten*, *ib.* 288.

MASTER AND SERVANT. — See ACTION, 1; DAMAGES, 8; SEDUCTION.

MECHANIC'S LIEN. — See MORTGAGE.

#### MINE.

The owner of a mine is bound so to work it as to leave sufficient support for the surface land above it. (WILLIAMS and MERCUR, JJ., dissenting.) — *Coleman v. Chadwick*, 80 Penn. St. 81.

[See *Wilson v. Waddell*, 2 App. Cas. 95, *contra.*]

#### MORTGAGE.

An agreement was made for the loan of money on mortgage. After the mortgage was executed and recorded, but before it was delivered to the mortgagee, or the money paid by him to the mortgagor, a mechanic's lien attached on a building erected on the land mortgaged. *Held*, that the mortgage had

priority over the lien. — *Jacobus v. Mutual Benefit Life Ins. Co.*, 12 C. E. Green, 604.

See DAMAGES, 2; FORECLOSURE; JURY; TAX, 1, 6; TENANT IN COMMON.

#### MUNICIPAL CORPORATION.

1. A house in a city was destroyed by fire set by sparks from an engine, which was, by force of the city ordinances, a nuisance liable to be abated; but the city, though having notice of the existence of such nuisance, had neglected to abate it. *Held*, that the owner of the house had no cause of action against the city. — *Davis v. Montgomery*, 51 Ala. 139.

2. A city empowered by statute to "regulate" taverns, cannot license them. — *Burlington v. Bumgardner*, 42 Iowa, 673.

3. A city empowered by statute to "suppress and restrain" billiard-tables, may license them. — *Burlington v. Lawrence*, 42 Iowa, 681.

See CONSTITUTIONAL LAW, 4, 8; CONSTITUTIONAL LAW (STATE), 2, 3, 4; TAX, 2, 3.

#### NATIONAL BANK.

The right of a national bank, indorsee of a bill of exchange, to recover on the bill against the acceptor, is not affected by the fact that the bank has discounted the bill for the payee at a usurious rate of interest. — *Smith v. Exchange Bank*, 26 Ohio St. 141.

See CONSTITUTIONAL LAW, 1.

NEGLIGENCE. — See ACTION, 1; CARRIER, 3; MINE; MUNICIPAL CORPORATION, 1; PROXIMATE CAUSE.

NEGOTIABLE INSTRUMENTS. — See BILLS AND NOTES.

NOTICE. — See ADVERTISEMENT.

#### NUISANCE.

A nuisance was created near a house, whereby the house was made unwholesome, and the tenant's wife sick. *Held*, that though the tenant had a right of action, in which he might recover damages for the injury to his wife's health, yet that such action accrued to him only as occupier of the house, and therefore that after his death the wife could maintain no action. — *Ellis v. Kansas City R.R. Co.*, 63 Mo. 131.

See ACTION, 2; MUNICIPAL CORPORATION, 1.

#### OFFICER.

A clerk of a court, appointed by the judge *de facto*, is well appointed, and may hold his office though the judge be ousted. — *People v. Staton*, 73 N. C. 546.

See ARREST, 1; COSTS; SATISFACTION.

ORDINANCE. — See CONSTITUTIONAL LAW, 8; MUNICIPAL CORPORATION, 2, 3.

#### PARDON.

A prisoner pardoned after conviction and sentence remains liable for the costs of prosecution. — *State v. Mooney*, 74 N. C. 98.

PARTIES. — See CORPORATION, 3; FORECLOSURE; INSURANCE (FIRE), 1.

## PARTNERSHIP.

A bill was drawn by one partnership on, and accepted by, another, the two having a common partner. *Held*, that no notice of dishonor was required to charge the drawers. — *New York & Ala. Contracting Co. v. Selma Savings-Bank*, 51 Ala. 305. So where the drawers were a partnership of which the acceptor was a member. — *New York & Ala. Contracting Co. v. Meyer*, ib. 325. See EXEMPTION, 1; ILLEGAL CONTRACT, 1; INSURANCE (FIRE), 1.

PAYMENT. — See BILLS AND NOTES, 1.

PENAL ACTION. — See CONVERSION.

PERSONAL LIABILITY. — See CORPORATION, 2, 3.

PLEADING. — See EASEMENT.

PREROGATIVE. — See CONSTITUTIONAL LAW (STATE), 1.

PRINCIPAL AND AGENT. — See AGENT.

PRINCIPAL AND SURETY. — See SURETY.

PRIORITY. — See CORPORATION, 2; MORTGAGE; TAX, 1.

PRIVILEGE. — See ARREST, 2.

## PROXIMATE AND REMOTE CAUSE.

Sparks from a locomotive set fire to a tie, whence the fire caught in rubbish left on the track, spread to a fence adjoining the track, burned over two fields, and destroyed another fence and woods two hundred yards from the track. In an action by the owner of the latter fence and woods against the owners of the locomotive, *held*, that whether defendants' negligence was the proximate cause of plaintiff's loss was a question for the jury. — *Pennsylvania R.R. Co. v. Hope*, 80 Penn. St. 373.

RAILROAD. — See CARRIER, 1, 3; CONSTITUTIONAL LAW, 3, 7; CONSTITUTIONAL LAW (STATE), 3; PROXIMATE CAUSE; RECEIVER; TAX, 6.

## RATIFICATION.

If a man's name be signed to a contract without his authority, he may make himself liable on the contract by ratifying it, without a new consideration. — *First Nat. Bank of Trenton v. Gay*, 63 Mo. 33.

## RECEIVER.

A person wrongfully ejected from the cars of a railroad corporation may sue the corporation, though in the hands of a receiver, without leave of the court by which the receiver is appointed. — *Allen v. Central R.R.*, 42 Iowa, 688.

RELATION. — See LIMITATIONS, STATUTE OF, 1; MORTGAGE.

RELEASE. — See EXECUTOR, 4.

REMAINDER. — See FORECLOSURE.

## REMOVAL OF SUITS FROM STATE TO UNITED STATES COURTS.

After a case has been once tried in a State court, and a new trial granted, it cannot be removed into the United States Circuit Court. — *Chandler v.*

*Coe*, 56 N. H. 184; and see now U. S. St. 1875, c. 137, § 3. (18 Sts. at Large, Pt. III. 471.)

See CONFLICT OF FEDERAL AND STATE AUTHORITY.

REPEAL. — See CONSTITUTIONAL LAW (STATE), 1; MARRIED WOMAN, 1.

REVOCATION. — See DEVISE, 4.

#### SALE.

Animals brought to a market for sale, and there abandoned by their owner, are not within the statutes concerning estrays; and the owners of the market, if they cannot, with reasonable diligence, find the owner of the animals, may sell them for his benefit; and one who buys them, with notice of all the facts, and under an agreement that the sellers shall hold the purchase-money for the true owner, cannot resist payment of such purchase-money, on the ground that the sellers have no title. — *Trustees of Millcreek Township v. Brighton Stock Yards Co.*, 27 Ohio St. 435.

See AGENT; FRAUDS, STATUTE OF, 2; INJUNCTION, 1; TAX, 6.

#### SATISFACTION.

A sheriff who had neglected to serve an execution committed to him, paid the amount of it to the creditor, and took an assignment of it. *Held*, that the judgment was not satisfied, and that an *alias* execution might issue for the sheriff's benefit. — *Heilig v. Lemley*, 74 N. C. 250.

SAVINGS-BANK. — See CONSTITUTIONAL LAW, 2.

SCHOOL. — See TAX, 4.

#### SEDUCTION.

A guardian cannot, as such, maintain an action for the seduction of his ward; nor can he maintain it as her master, if she is in charge of his household during his wife's sickness, on an understanding with him, without paying board, but without any agreement with her or her father for the payment of wages, or for any definite term of service. — *Blanchard v. Ilsley*, 120 Mass. 487.

SET-OFF. — See TAX, 2, 3.

SPECIFIC PERFORMANCE. — See HOMESTEAD, 2.

STATUTE. — See CONSTITUTIONAL LAW; CONSTITUTIONAL LAW (STATE);  
MARRIED WOMAN, 1.

STATUTE OF FRAUDS. — See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. — See LIMITATIONS, STATUTE OF.

STOCK. — See DAMAGES, 4.

SURETY. — See BOND; FRAUDS, STATUTE OF, 3.

SURVIVAL OF ACTIONS. — See NUISANCE.

#### TAX.

1. Taxes on land have not, unless it is expressly given by statute, a lien prior to that of a mortgage recorded before they are assessed. — *Dows v. Drew*, 12 C. E. Green, 442.

2. A town summoned as garnishee cannot set off taxes assessed by it on the defendant against the debt due from it to him. — *Hibbard v. Clark*, 56 N. H. 155.

3. A person lawfully taxed by a municipal corporation cannot set off the tax against a debt due him from the corporation, nor will equity at his suit enjoin the collection of the tax until the debt is paid. — *Finnegan v. Fernandina*, 15 Fla. 379, and see *Cobb v. Elizabeth City*, 75 N. C. 1.

4. A statutory exemption from taxation of school-houses and seminaries of learning extends to such as are founded by a particular religious sect for instruction according to its doctrines. — *Warde v. Manchester*, 56 N. H. 508.

5. The lessee of a stall in a market-house, who there furnishes meals to the public, is not within a statute taxing "eating-houses." — *State v. Hall*, 73 N. C. 252.

6. The property of a railroad corporation was by statute exempted from taxation. Held, that a purchaser of the company's property and franchises at a sale under a mortgage or execution did not succeed to the exemption. — *Morgan v. Louisiana*, 93 U. S. 217.

See CONSTITUTIONAL LAW, 1, 4, 7, 8; CONSTITUTIONAL LAW (STATE), 3.

#### TENANT IN COMMON.

Where one tenant in common occupies and cultivates the common estate, to the exclusion of his co-tenants, the latter have a right to an account of the profits of the crops produced, but no property in the crops; and therefore a mortgage of these crops by the occupying tenant is good against his co-tenants, and the mortgagee is not liable to account to them. — *Bird v. Bird*, 15 Fla. 424.

See DOWER, 2.

#### TENANT FOR LIFE. — See FORECLOSURE.

TIME. — See CONTRACT; FRAUDS, STATUTE OF, 1; PRIORITY.

TREATY. — See CONSTITUTIONAL LAW, 5.

TRESPASS. — See ARREST, 1; DAMAGES, 2; EASEMENT; INJUNCTION, 2.

#### TRUST.

1. A trustee's final account, showing a balance of income due from him to the *cestui que trust*, was allowed by the Probate Court. Held, that the *cestui que trust* might recover this balance in an action at law against the trustee. — *Johnson v. Johnson*, 120 Mass. 465.

2. Devise to J. S. "to hold the same in trust for the use and benefit of" certain unincorporated societies. Held, that no trust was "fully expressed and clearly defined," and therefore (by force of a statute) that the devise was void. — *Ruth v. Oberbrunner*, 40 Wis. 238.

See CHARITY; DEVISE, 5.

TRUSTEE PROCESS. — See FOREIGN ATTACHMENT.

USAGE. — See CARRIER, 2.

USURY. — See NATIONAL BANK.

VARIANCE. — See EVIDENCE, 3.

VENDOR AND PURCHASER. — See HOMESTEAD, 2.

#### VENUE.

1. The decision of an inferior court on an application for a change of venue in a criminal case is final and not subject to exception. (Overruling former decisions.) — *Kelly v. The State*, 52 Ala. 361.

2. A statute authorized a change of venue on the application of "any party in any civil action." *Held*, that the venue could not be changed on the application of one of several defendants, who had severed in his pleadings. — *Rupp v. Swineford*, 40 Wis. 28.

#### VERDICT.

1. By statute there are three degrees of a crime: the first is punishable with death or imprisonment, as the jury shall determine; for the second and third the jury cannot determine the punishment. On an indictment sufficient to support a conviction in the first degree, the jury returned a general verdict of guilty, not naming any degree, and affixing the punishment of imprisonment. *Held*, good as a verdict of guilty in the first degree. — *Davis v. The State*, 52 Ala. 357.

2. On an indictment charging in two counts different offences, which cannot receive the same punishment, a general verdict of guilty is bad. — *State v. Johnson*, 75 N. C. 123.

VOID AND VOIDABLE. — See EXECUTOR, 3; JUDGMENT, 4.

VOTER. — See CONSTITUTIONAL LAW (STATE), 4; INTENT.

WAIVER. — See HOMESTEAD, 1.

WAR. — See ILLEGAL CONTRACT, 1; INSURANCE (LIFE), 2; JUDGMENT, 1, 3.

#### WAY.

Where a right of way to certain land exists by adverse user only, proof that it was used for various purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate while substantially in the same condition. — *Parks v. Bishop*, 120 Mass. 340.

See DOWER, 1; EASEMENT; INCUMBRANCE.

WILL. — See DEVISE; EVIDENCE, 1, 2; MARRIED WOMAN, 1; WITNESS, 1.

#### WITNESS.

1. The executor named in the will is a competent attesting witness, though he is entitled by law to a commission on the estate for his services. — *Stewart v. Harriman*, 56 N. H. 25.

2. The grand jury found a true bill, one of their number not voting. *Held*, that the latter was a competent witness at the trial; and *semble* that he would have been so though he had concurred with his fellows. — *State v. McDonald*, 73 N. C. 346.

See EVIDENCE, 2.

WORDS.

- " *Any Party in a civil Action.*" — See VENUE, 2.
- " *Disposing of.*" — See INJUNCTION, 1.
- " *Eating-house.*" — See TAX, 5.
- " *Freeholder.*" — See JURY.
- " *Imprisonment for Debt.*" — See CONSTITUTIONAL LAW (STATE), 5.
- " *Regulate.*" — See MUNICIPAL CORPORATION, 2.
- " *Representatives.*" — See DEVISE, 1.
- " *Suppress and Restrain.*" — See MUNICIPAL CORPORATION, 3.
- " *Until.*" — See CONTRACT.

WORK AND LABOR. — See ASSUMPSIT.



## DIGEST OF CASES IN BANKRUPTCY.

[THIS Digest includes Nos. 1 to 7, inclusive, of Vol. XV. *National Bankruptcy Register*, with a few cases reported elsewhere.]

## ACTION.

1. An assignee can maintain an action to recover the value of property sold by an attaching creditor upon an execution issued after proceedings in bankruptcy were begun, upon an attachment made less than four months before that time. — *Bracken v. Johnson*, 15 N. B. R. (C. Ct. Iowa) 106.

2. An agreement between creditors who have received preferences to pay proportionately the amount necessary to prevent other creditors from instituting proceedings in bankruptcy, is valid, and an action will lie to recover such proportion. — *Perryman v. Allen*, 15 N. B. R. (Sup. Ct. Ala.) 118.

3. A creditor may prove his claim in bankruptcy against the principal, and before final disposition of the assets, prosecute his action against the surety. — *Gregg v. Wilson*, 15 N. B. R. (Sup. Ct. Ind.) 142.

4. An insolvent debtor transferred to a creditor his entire stock of goods, and within a few days after the same was attached by the sheriff at the instance of other creditors. Shortly after the debtor was adjudged a bankrupt, and the assignee, under his warrant, took and sold the property, without any judgment of the Bankrupt Court, that the sale was invalid. *Held*, that the creditor could recover for such unlawful taking, — the measure of damages being the full value of the property taken. — *Bromley v. Goodrich*, 15 N. B. R. (Sup. Ct. Wis.) 289.

5. A suit pending against a party at the time he is adjudged a bankrupt, may, after due notice to his assignee, be prosecuted to final judgment against the latter in his representative capacity, where he makes no objection to the jurisdiction and the Bankrupt Court does not arrest the proceedings. — *Morton v. Switzer*, 93 U. S. 355.

6. A judgment in such action may be filed with the assignee as an ascertainment of the amount due to the creditor by the bankrupt, and as a basis of dividends, but it is effectual and operative for that purpose *only*. — *Ibid*.

See ASSIGNEE, 2, 3, 5.

## ADJUDICATION.

A. and B. may be adjudicated bankrupts as members of the firm of A. B. & Co., notwithstanding their previous adjudication in another district as members of the firm of J. & P. — *In re Jewett*, 15 N. B. R. (W. D. Wis.) 126.

See PARTNERSHIP, 6; PLEADINGS, 1.

AFFIDAVIT. — See INVOLUNTARY PETITION, 12.

AGENT. — See INVOLUNTARY PETITION, 13.

AGREEMENT. — See ACTION, 2.

AMENDMENT. — See INVOLUNTARY PETITION, 12.

ASSIGNEE.

1. The assignee, upon the bankruptcy of a partner, takes the bankrupt's interest in the firm without the firm being declared bankrupt. — *Wilkins v. Davis*, 15 N. B. R. (Mass. Dist.) 60.

2. An assignee of a general partner may recover from the special partner, at law or in equity, what is due from him according to the terms of the copartnership articles. — *Ibid*.

3. An assignee has all the rights and powers which are given to the whole body of creditors, or to the whole of any one class of creditors, whether at law or in equity, and may maintain any suit for which a general creditor's bill would lie. — *Ibid*.

4. Assignees who intend to charge for services beyond the fees mentioned in Rule 30, must warn the creditors of the fact in notices for the meeting at which the account is to be considered. — *Ex parte Whitcomb*, 15 N. B. R. (Mass. Dist.) 92.

5. An assignee cannot recover the value of mortgaged property, which the mortgagee took possession of and sold before adjudication in bankruptcy, whether the mortgage was properly recorded or not. — *Miller v. Jones*, 15 N. B. R. (C. Ct. N. J.) 150.

6. An assignee in bankruptcy of the mortgagors of a chattel mortgage stands in the position of a judgment creditor, the adjudication of bankruptcy being equivalent to the recovery of judgment and levy. — *Ibid*.

7. The title of the assignee in general relates back only to the commencement of the proceedings in bankruptcy, but in the particular case of transfers made void as to him, his title relates back to the time of such transfer. — *In re Biesenthal*, 15 N. B. R. (N. D. N. Y.) 228.

8. The only relation the assignee sustains to the bankrupt is to set aside his exempt property; in all else he is the agent of the law for the benefit of the creditors. He is to recover from the assignees of the bankrupt any property or other assets which the creditors themselves could have recovered, though the bankrupt himself might have been estopped to recover it. — *Aiken v. Edrington*, 15 N. B. R. (S. D. Miss.) 271.

9. He supplies the place of the marshal or sheriff in pursuing and seizing property and turning it into money, to pay claims proved, or under the order of the court. — *Ibid*.

10. Where a bankrupt had purchased property not intending to pay for it, and there had been no attachment, and the property had not been conveyed in fraud of creditors, the assignee has no higher interest in or better title to it than the bankrupt. — *Donaldson v. Freeman*, 15 N. B. R. (S. C. U. S.) 277.

See ACTION, 1, 5, 6; COMPOSITION, 13; LIEN, 4.

ASSIGNMENT.

1. Creditors, who were fully cognizant of the debtor's affairs, have consented to a general assignment, and joined in its execution, cannot impeach the same as fraudulent. — *Johnson v. Rogers*, 15 N. B. R. (N. D. N. Y.) 1.

2. The assignee of a claim from one of the original assignees, who accepted the trust under the general assignment, with knowledge of the facts which render the assignment fraudulent, cannot impeach the assignment as fraudulent, the transfer being merely colorable. — *Ibid.*

3. But if he purchase of one who is ignorant of the original fraudulent assignment, and did not assent to it, he may upon that claim impeach it. — *Ibid.*

4. Or if he purchases of the original assignee in ignorance of the fraud, he is not precluded from impeaching it. — *Ibid.*

5. The purchaser of a judgment has no higher or better right to impeach a fraudulent assignment than the seller. — *Ibid.*

6. An assignee under a general assignment is to be allowed his disbursements made while in the execution of his trust, though the same is set aside by bankruptcy proceedings. — *MacDonald v. Moore*, 15 N. B. R. (S. D. N. Y.) 26.

7. Where a general assignment under a State law is set aside by an assignee in bankruptcy, a levy made upon the goods by a creditor before the filing of the petition in bankruptcy and after the general assignment, is good as against the assignee. — *Ibid.*

8. The Bankrupt Law does not suspend the right to make an assignment for the benefit of creditors, provided the assignment be one without preference and without intent to defraud creditors. — *Von Hein v. Elkus*, 15 N. B. R. (Sup. Ct. N. Y.) 194.

See EVIDENCE, 3.

#### ATTACHING CREDITORS.

Attaching creditors cannot vote at a composition meeting. — *In re Scott*, 15 N. B. R. (E. D. Mo.) 73.

See INVOLUNTARY PETITION, 9.

#### ATTACHMENT.

An attachment made within four months of the filing of the petition in bankruptcy will be dissolved on motion by the State court, although judgment has been entered, the property attached sold, and the proceeds paid over to the attorney in the attachment suit. — *Dickerson v. Spaulding*, 15 N. B. R. (Sup. Ct. N. Y.) 313.

See ACTION, 1; NOTICE.

ATTORNEY. — See COMPOSITION, 8; PRIORITY, 2.

BANKRUPTCY. — See FRAUDULENT TRANSFER.

BANKRUPT LAW. — See ASSIGNMENT, 8.

#### BILL IN EQUITY.

1. A bill in equity will lie, which charges, except in form, nothing more than *indebitatus assumpsit* for money had and received, if founded upon the allegation of constructive fraud under section 35 of the Bankrupt Act (Sect. 5128), *Harmanson v. Bain*, 15 N. B. R. (E. D. Va.) 173.

2. But if the evidence discloses the fact to be the transfers of property in alleged violation of such section to various persons not parties to the bill and

in separate transactions, the bill will not be sustained for the purpose of setting aside such transaction, because there is no prayer therefor. The proper parties are not joined, and the bill would be multifarious if they had been. — *Ibid.*

BOND. — See DEBT; DISCHARGE, 6.

BROKER. — See CONTRACT.

CHECKS. — See CHOSSES IN ACTION.

#### CHOSSES IN ACTION.

Where a bank had ceased to do business for ten years, and then resumed for the sole purpose of liquidation, and continued thus for seven years, and the deposits due from the bank had become commodities, bought and sold in the market as government bonds, not paid in money by the bank, but used only by way of set-off by those indebted to the bank, papers in the form of checks upon these deposits are not checks, because not payable in money nor drawn on a bank, and limited in negotiability, but they are simply evidence of an assignment of a chose in action. And a person who transfers or sells one does not become responsible for the face value thereof. — *Harmanson v. Bain*, 15 N. B. R. (E. D. Va.) 173.

CLAIM. — See INVOLUNTARY PETITION, 15.

CLERK. — See PRIVILEGED CLAIM.

#### COMPOSITION.

1. An order of reference to a register upon a matter of composition, should require him to report, not only whether the resolution for composition had been duly passed at the first meeting, but also whether it had been confirmed by the required signatures, and whether the terms of composition were for the best interest of all concerned. *In re Scott*, 15 N. B. R. (E. D. Mo.) 73.

2. It is the intent of the Bankrupt Act that a meeting for the purpose of adding to or varying the original proposition should follow the recording, &c., of the former resolution. But *semble* that if after the first meeting, and before the hearing, the debtor agrees to enlarge his offer, the court may inquire into it. The proposed advance in the percentage is only demonstrative of the fact that the original proposition, whether confirmed or not by the needed signatures, is not for the best interests of the creditors. — *Ibid.*

3. Under the Bankrupt Act of the United States, no second meeting of creditors to confirm the resolution of the first meeting is necessary, as required by the British Act. — *Ibid.*

4. At the hearing, of which the creditors are required to have notice, objections may be presented as to the due passage of the original resolution, the confirmatory signatures, and what is for the best interest of all concerned. — *Ibid.*

5. None but unsecured creditors can be heard at the hearing. *Semble* that a secured creditor who does not release his security at or before the first meeting, cannot be heard. — *Ibid.*

6. Notice to the creditors having been given, the required number of

unsecured creditors assembled at the first meeting called may pass the resolution. If a secured creditor wishes to vote, he must relinquish his security. The debtor must appear and submit the statement required. As no other formal meeting of the creditors is required, he is not bound to appear at the hearing to again submit his statement. — *Ibid.*

7. The fact that some individual assets were omitted in the statement at the first meeting does not render the action taken thereat void. It is for the court to decide, in the light of the facts, upon the alleged concealment of assets, and upon the failure to name all of the creditors. — *Ibid.*

8. When an attorney duly admitted to practice in this court, appears before the register to represent a person in interest, he must be accepted as such, unless some one puts him to proof by a rule therefor to show his authority. All others must show formal powers of attorney as prescribed by the General Orders. — *Ibid.*

9. While creditors should have the amplest opportunity to determine their action at each stage of the case, they must be held to the proper measure of diligence. If the provisions of the Bankrupt Act are to be so administered as to promote dilatory motions, its beneficence will disappear. — *Ibid.*

10. The resolution purporting to have been previously passed, together with the debtor's statement, having been presented to the court, a hearing will be ordered on notice. At this hearing it must be decided whether such resolution was duly passed and the needed confirmatory signatures obtained, and if proved to the satisfaction of the court, the court must then be satisfied that the terms, &c., are for the best interest of all concerned. — *Ibid.*

11. It is not necessary that the confirmatory signatures shall be attached to the resolution at the first meeting, but they must be attached before or at the hearing. They are essential to make the resolution operative. — *Ibid.*

12. The fact that a debtor has placed the name of a creditor in his list does not *prima facie* establish that he is a creditor. The creditor must prove himself to be such in the formal manner required by the statute and the General Orders. In involuntary proceedings, however, the petitioning creditors, on whose motion an order to show cause has been issued, are not bound to prove anew, and in another and more formal manner, that they are such creditors, at a meeting for composition. — *Ibid.*

13. A duly authorized attorney appeared before the register at a composition meeting and offered to vote, as representing a creditor under a power previously given. At the same time another person claiming to be an attorney also appeared, and produced a telegram, which he stated he had just received from the principal, revoking the former power and requesting him to act in his place. *Held*, it was the duty of the register to have deferred action until he could have examined to his satisfaction the proofs of the revocation and new appointment. — *Ibid.*

14. The discretion given to the Court of Bankruptcy by section 5099, to allow a reasonable compensation to the assignee for his services, is not a discretion that can be regulated beforehand by the Supreme Court, nor can it be exercised by the register, but by the court. — *Ex Parte Whitcomb*, 15 N. B. R. (Mass. Dist.) 92.

See ATTACHING CREDITORS; ATTORNEY.

CONFESSION OF JUDGMENT. — See PREFERENCE, 3.

CONSTRUCTIVE FRAUD. — See BILL IN EQUITY.

### CONSTRUCTION.

Whether an instrument in writing is of itself a fraud in law, must be determined in view of the instrument alone; any presumed or assumed collateral understanding adverse to, or differing from, the instrument is a fact for the jury, and cannot be called to the aid of the court. *Miller v. Jones*, 15 N. B. R. (C. Ct. N. J.) 150.

### CONTRACTS.

1. Contracts of sale that do not contemplate the actual *bonâ fide* delivery of the property by the seller nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time, are, under Wisconsin laws, gaming contracts and void. — *In re Green*, 15 N. B. R. (W. D. Wis.) 198.

2. A broker who has advanced money to pay these differences upon such a contract for the bankrupt, cannot prove his claim for such advances. — *Ibid*.

CONVERSION. — See PLEADINGS, 2.

CORPORATION. — See INVOLUNTARY PETITION, 13.

CREDITOR'S BILL. — See LIEN, 1.

CREDITORS. — See COMPOSITION, 9.

DAMAGES. — See PLEADINGS, 3.

### DEBT.

The claim of a creditor upon a bond, the sureties upon which have been indemnified by a mortgage given by the debtor, is not a secured claim, and is to be counted in computing the proportion joining in an involuntary petition. *In re Lloyd*, 15 N. B. R. (W. D. Pa.) 257.

### DISCHARGE.

1. A discharge in bankruptcy is a bar to a claim for breach of covenant of warranty in a deed. — *Williams v. Harkins*, 15 N. B. R. (Sup. Ct. Geo.) 34.

2. If one member of a firm becomes bankrupt and obtains his discharge, he is released from all his debts, joint and separate. — *Wilkins v. Davis*, 15 N. B. R. (Mass. Dist.) 60.

3. And the bankrupt's copartners are equally bound by the discharge with the joint creditors. — *Ibid*.

4. A bankrupt must apply for his discharge before the administration of his estate is completed. — *In re Brightman*, 15 N. D. R. (N. D. N. Y.) 213.

5. A debt due from a factor for the proceeds of goods sold, is barred by his discharge in bankruptcy. — *Woolsey v. Cade*, 15 N. B. R. (Sup. Ct. Ala.) 238.

6. Sureties upon an appeal bond are not released, by a discharge in bankruptcy of the principal before judgment was affirmed on appeal. — *Knapp v. Anderson*, 15 N. B. R. (Sup. Ct. N. Y.) 316.

## DIVIDEND.

A dividend, when made pursuant to proper notice and filed in court, becomes virtually a judgment of the court and cannot be disturbed, except for some error committed by the register, apparent from his memoranda and papers on file, existing at the time or prior to making the dividend. — *In re Smith*, 15 N. B. R. (W. D. Tex.) 97.

See PARTNERSHIP, 3; REGISTER, 3.

ENDORSEMENT. — See INVOLUNTARY PETITION, 4.

ERROR. — See PRACTICE.

## EVIDENCE.

1. The levy of a *fi. fa.* upon land by the sheriff, without more, is not sufficient evidence of a breach of covenant of warranty of title contained in the defendant's deed. — *Williams v. Harkins*, 15 N. B. R. (Sup. Ct. Geo.) 34.

2. The memoranda made by a register may be used as evidence of his own acts in any matter that has come before him judicially. — *In re Crane*, 15 N. B. R. (W. D. Tex.) 120.

3. An assignment in bankruptcy cannot be proved by oral testimony, unless it is first shown that the original or a certified copy thereof cannot be produced. *Burk v. Winters*, 15 N. B. R. (Sup. Ct. Ark.) 140.

4. The disposal by a debtor of his property out of the usual and ordinary course of his business, is *prima facie* evidence of fraud. — *Webb v. Sachs*, 15 N. B. R. (Oreg. Dist.) 168.

See PREFERENCE, 4; WITNESS, 2.

EXAMINATION. — See PARTNERSHIP, 3.

## EXEMPTION.

The amendment of March 3, 1873, did not make unconstitutional provisions of the State laws as to exemptions a part of the system of bankruptcy. — *Bush v. Lester*, 15 N. B. R. (Sup. Ct. Geo.) 36.

See LIEN, 7.

EXPERT. — See PRIVILEGED CLAIM.

FACTOR. — See DISCHARGE, 5.

FEDERAL COURTS. — See JURISDICTION, 2.

## FEES.

Though the register rendered services before the promulgation of General Orders No. 30, adopted April 12, 1875, his right to fees must be determined by that order. — *In re Carstens*, 15 N. B. R. (S. D. N. Y.) 250.

See ASSIGNEE, 4; ASSIGNMENT, 6; COMPOSITION, 13; PRIORITY, 4; WITNESS, 1.

FIDUCIARY DEBT. — See DISCHARGE, 5.

FRAUD. — See EVIDENCE, 4.

## FRAUDULENT ACT.

An act done in fraud of the Bankrupt Act, is not necessarily what is known or considered as a fraudulent act, but only something the effect of which is

to evade or avoid its provisions. — *Webb v. Sachs*, 15 N. B. R. (Oreg. Dist.) 168.

FRAUDULENT CONVEYANCE. — See LIEN, 6.

#### FRAUDULENT PREFERENCE.

Where the trustee of a creditor fraudulently preferred, surrenders the property without suit to the assignee, the creditor may prove his debt and share in the estate. — *In re Clarke*, 10 N. B. R. 21.

See JURISDICTION, 1.

#### FRAUDULENT SALE.

A party not intending to pay, who induces the owner to sell him goods on credit, by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract, and recover the goods. — *Donaldson v. Farwell*, 15 N. B. R. (U. S. S. Ct.) 277.

#### FRAUDULENT TRANSFER.

The receipt of property by a party, contrary to section 35 of the Bankrupt Act, section 5128, Revised Statutes, is not tortious. It is valid, contingently upon the debtor's being adjudged bankrupt. — *Schuman v. Fleckenstein*, 15 N. B. R. (Oreg. Dist.) 224.

See ASSIGNEE, 7.

GAMING CONTRACTS. — See CONTRACTS.

GUARDIAN. — See MORTGAGE, 3, 4.

#### HOMESTEAD.

A bankrupt having acquired under the laws of Texas a rural homestead, has a vested right, which cannot be affected by the fact that the land embracing such homestead was subsequently included within the limits of a city. — *In re Young*, 15 N. B. R. (W. D. Tex.) 205.

#### INFORMATION.

A bankrupt may be proceeded against by information for wilfully and fraudulently omitting from his inventory some of his assets, contrary to section 5132 Revised Statutes, subd. 6. — *United States v. Block*, 15 N. B. R. (Oreg. Dist.) 325.

#### INSOLVENCY.

Where a banking institution had suspended its business for a number of years, and resumed only for the purpose of liquidation, a test of its insolvency is whether its assets could be so managed as to liquidate its debts. — *Harman-son v. Baine*, 15 N. B. R. (E. D. Va.) 173.

#### INSOLVENT.

A trader is insolvent when he is unable to pay his debts in money as they become due in the ordinary course of his business, even if it appears probable that he will be able to pay them in full if time be given him for that purpose. — *Webb v. Sachs*, 15 N. B. R. (Oreg. Dist.) 168.



## INTENT. — See PREFERENCE.

## INTEREST.

Interest is to be computed upon all claims, bearing interest, to the date of the filing of the petition. — *In re Broich*, 15 N. B. R. (E. D. Wis.) 11.

## INVOLUNTARY PETITION.

1. The act of joining in a creditor's petition by a secured creditor without reference to his security, is a waiver thereof, and he is to be estimated in computing the proportion. — *In re Broich*, 15 N. B. R. (E. D. Wis.) 11.

2. A creditor who has made an attachment within four months of the commencement of proceedings in bankruptcy is to be estimated in computing the number necessary to join in an involuntary petition. — *Ibid*.

3. In computing the amount of provable debts that must be represented in a creditor's petition, creditors holding claims under as well as over two hundred and fifty dollars must be included. — *Ibid*.

4. An indorsee of a note, who receives payment of the same in full from the indorser after the filing of the petition in bankruptcy, cannot be permitted to join in the petition, although he had verified proof of the claim before a register, before the payment. — *Ibid*.

5. A creditor holding security is to be counted in computing the number necessary to join in an involuntary petition, to the amount of the excess of the debt over the security. — *Ibid*.

6. And the court may estimate that value at the hearing upon the petition. — *Ibid*.

7. A petition containing the ordinary allegations that the petitioning creditors constitute at least one-fourth in number, and that the aggregate of their debts provable amounts to at least one-third, &c., is not invalid if it appears that such proportion is made up of claims each less than two hundred and fifty dollars. — *In re Hall*, 15 N. B. R. (E. D. Mich.) 81.

8. Creditors may make up the requisite number, either by computing those only whose debts exceeded two hundred and fifty dollars, or by uniting one-quarter in number of *all* the creditors. — *Ibid*.

9. When a creditor of an alleged bankrupt, either by arrangement with the bankrupt or by attachment, obtains a security or lien for his claim in fraud of the Bankrupt Act, or which would be avoided by that act if the debtor is adjudged a bankrupt, he cannot be counted, nor can his claim be estimated in computing the number and value necessary to be joined in a petition. — *In re Scrafford*, 15 N. B. R. (C. Ct. Kan.) 104.

10. An order of a District Court reinstating an involuntary petition after its dismissal, without further notice or appearance, is without authority of law, and any adjudication following such reinstatement, is absolutely void. — *Gage v. Gates*, 15 N. B. R. (Sup. Ct. Mo.) 145.

11. An order by such court directing the sheriff to pay the proceeds of a sale made by him to an assignee subsequently elected, is also void, and can afford no protection to the sheriff. — *Ibid*.

12. If the affidavit filed with the petition is not sufficient to show an act

of bankruptcy, or fails to describe with certainty the commercial paper of which payment was suspended, amended or supplemental proofs may be filed. — *In re Hanibel*, 15 N. B. R. (Col. Dist.) 233.

13. Upon an involuntary petition filed by a corporation, a verification by an agent is sufficient under all circumstances, and such agent need not be an officer of the corporation. But his authority to act should be set forth in the affidavit, or otherwise established. A mere recital of the fact following deponent's name is not sufficient. — *Ibid.*

14. In computing the number necessary to join in an involuntary petition, two modes may be adopted, — first, by taking at least one-fourth of the creditors whose provable debts severally are over two hundred and fifty dollars, and in the aggregate are equal in amount to one-third of all the debts provable under the act; or, secondly, in default of enough of this class, then by joining creditors, at least one-fourth in number of all the creditors, whose debts, without regard to their several amounts, are equal in the aggregate to one-third of the aggregate amount of all the provable debts of the bankrupt. — *In re Lloyd*, 15 N. B. R. (W. D. Pa.) 257.

15. It is no reason for excluding a claim that the holder is a trustee under a voluntary assignment by the debtor for the benefit of his creditors. Some fraud connected with it must be shown. — *Ibid.*

16. Creditors of a partnership have a right to prove their claims against the estate of a bankrupt partner, and are good petitioners under a separate commission, and should be counted in making the quorum. — *Ibid.*

See DEBT; REGISTER, 5.

#### JUDGMENT.

See ACTION, 5, 6; ASSIGNEE, 6; ASSIGNMENT, 5; DIVIDEND, 7; LIEN, 3, 5.

#### JURISDICTION.

1. An assignee in bankruptcy under the Bankrupt Act of 1867, as it stood before the revision, had authority to bring a suit in the State courts, to recover money paid to a creditor as a fraudulent preference. — *Clafin v. Houseman*, 15 N. B. R. (U. S. S. Ct.) 49.

2. Federal courts have exclusive jurisdiction of actions brought by assignees to recover the value of goods transferred in fraud of the Bankrupt Law. — *Bromley v. Goodrich*, 15 N. B. R. (Sup. Ct. Wis.) 289.

3. If a sale has been declared void by judgment of the Bankrupt Court, the State court is bound to enforce and carry out that decision, but the State court cannot declare a sale, valid under the State law, void, because so made under the Bankrupt Law. — *Ibid.*

4. An assignee may sue in a State court to collect claims due the bankrupt estate. — *Russell v. Owen*, 15 N. B. R. (Sup. Ct. Mo.) 322.

JURY. — See CONSTRUCTION.

#### LIEN.

1. The lien acquired by a creditor's bill extends only to property which cannot be reached on execution. — *Johnson v. Rogers*, 15 N. B. R. (N. D. N. Y.) 1.

2. Until a receiver is appointed in the creditor's action, there is no lien as against the chattels of the debtor, which are subject to levy and sale on execution, which can be upheld as against an assignee in bankruptcy. — *Ibid.*

3. A judgment against an individual partner constitutes a lien upon the real estate of the partnership, subject to the payment of the firm debts and to the equities of his partners. — *Ibid.*

4. If a creditor for any reason is precluded from assailing a general assignment made by a debtor, he can acquire no lien as against the assignee in bankruptcy. — *Ibid.*

5. If several judgments are recovered, the liens of each attach as to real estate in the order of their priority; as to personal estate, the priority is determined by the order of levies under execution. — *Ibid.*

6. Where a general assignment was void as intended to hinder and delay creditors, judgments obtained after the assignment and before commencement of proceedings in bankruptcy, became a lien upon the real estate, and upon the personal property also, if levy is made upon the same under the execution, to the same extent as though such property had never been transferred by the debtors, and such lien is good against the assignee in bankruptcy. — *Ibid.*

7. By the laws of Georgia, a judgment constitutes a lien upon the debtor's land which is not extinguished by bankruptcy, and if not proved in bankruptcy may be enforced upon land set apart as exempt. — *Bush v. Lester*, 15 N. B. R. (Sup. Ct. Geo.) 36.

See PRIORITY, 1.

MEASURE OF DAMAGES. — See ACTION, 4.

#### MORTGAGE.

1. By the statutes of New Jersey, a chattel mortgage is good against all subsequent creditors from the time of filing. — *Müller v. Jones*, 15 N. B. R. (C. Ct. N. J.) 150.

2. And, upon refileing, a statement which notifies subsequent creditors of the extent of the mortgagee's lien is sufficiently specific. — *Ibid.*

3. An agreement by a guardian to discharge an old mortgage and receive a new one in its place is not absolutely void, though he violated his duty and transcended his power in making it. It is voidable only at the election of the ward on coming of age. — *Burdick v. Jackson*, 15 N. B. R. (Sup. Ct. N. Y.) 318.

4. An agreement to execute a mortgage made with the guardian of infants inures to their benefit, and was well executed by the mortgage to them. — *Ibid.*

5. An agreement based upon a valuable consideration to give a mortgage will be treated in equity as a mortgage. — *Ibid.*

See ASSIGNEE, 5, 6; PREFERENCE, 6.

#### NEW PROMISE.

To repel the bar of an adjudication in bankruptcy a new promise need not be in writing. — *Henly v. Lanier*, 15 N. B. R. (Sup. Ct. N. C.) 280.

## NOTARY PUBLIC.

Schedules sworn to before a notary public are properly verified. — *In re Bailey*, 15 N. B. R. (Mass. Dist.) 48.

## NOTICE.

Upon a motion to dissolve an attachment, and for the sheriff to show cause why he should not deliver the property to the assignee, the sheriff is entitled to notice. — *Dickerson v. Spaulding*, 15 N. B. R. (Sup. Ct. N. Y.) 313.

## PARTNERSHIP.

1. The bankruptcy of one partner dissolves the partnership, and the assignee becomes tenant in common with the solvent partner in the joint stock. — *Wilkins v. Davis*, 15 N. B. R. (Mass. Dist.) 60.

2. A court of equity has power to entrust the solvent partner or the assignee with the exclusive control of the settlement; but if no order is made the assignee in possession will go on and effect the settlement. — *Ibid*.

3. A joint creditor may prove under a separate bankruptcy, may vote for assignee, be heard upon the discharge, and examine the debtor, and share any joint assets or any surplus of the separate assets. — *Ibid*.

4. When a party holds himself out as a partner, and thereby procures credit upon the strength of his supposed relation, he is held to be such partner. Neither community of interest nor participation in the profits is absolutely necessary in such cases. But knowledge or notice of his being so held out must be brought home to him, or there must be proof of circumstances which will authorize a court to presume notice before he can be so charged. — *In re Jewett*, 15 N. B. R. (W. D. Wis.) 126.

5. False statements by a member of a firm as to its financial condition, made to a person, who subsequently purchases of a third party the firm's paper, made after the statement, do not render the partner liable individually. — *In re Schuchardt*, 15 N. B. R. (S. D. N. Y.) 161.

6. The adjudication of one partner, as a bankrupt, dissolves the partnership. — *Blackwell v. Claywell*, 15 N. B. R. (Sup. Ct. N. C.) 300.

See ADJUDICATION; ASSIGNEE, 2; DISCHARGE, 3; INVOLUNTARY PETITION, 16; LIEN, 3.

PARTNERSHIP ASSETS. — See ASSIGNEE, 1.

## PETITION.

Creditors have no power to compel partners, willing or unwilling, to petition other persons, alleged to be partners with them, into bankruptcy. Nor can any one lawfully be called upon to show cause why he shall not go himself or put anybody else into bankruptcy. — *In re Harbaugh*, 15 N. B. R. (W. D. Pa.) 246.

## PLEADINGS.

1. Where an affidavit of defence setting up an adjudication in bankruptcy is filed, the court must stay proceedings by refusing judgment. — *Frostman v. Hicks*, 15 N. B. R. (C. C. Pl. Pa.) 41.

2. In an action by an assignee to recover the value of certain property transferred by the bankrupt contrary to the provisions of section 5128 Revised

Statutes, the complaint must allege a conversion in terms, or its legal equivalent, a demand and refusal. — *Schuman v. Fleckenstein*, 15 N. B. R. (Oreg. Dist.) 224.

3. In such case the assignee may also recover damages for an injury to or detention of the goods. — *Ibid*.

4. The charge in the alternative in an involuntary petition that the debtors were insolvent or in contemplation of bankruptcy, is not sufficient. — *In re Hanibel*, 15 N. B. R. (Col. Dist.) 233.

5. To a complaint to subject to the satisfaction of a judgment at law obtained by a creditor of the bankrupt's fraudulent assignor a fund in the hands of the assignee, a demurrer that the complainant's right is barred by the two years' limitation provided in the Bankrupt Act; is not well taken if the grounds stated in avoidance of the bar applied to the assignee as concealing the alleged fraud. — *Aiken v. Edrington*, 15 N. B. R. (S. D. Miss.) 271.

6. An assignee of demands in existence at the time of their alleged fraudulent transfer has the same rights that the assignor would have had if no assignment had been made, and it is no ground of demurrer that the complainant was not the owner at that time. — *Ibid*.

6. A bankrupt may maintain an action in his own name upon a promissory note assigned to him as part of his exempt property. — *Henly v. Lanier*, 15 N. B. R. (Sup. Ct. N. C.) 280.

7. It is no defence to a demand made by an assignee for a balance due at the date of filing the petition, to set up an order, restraining the defendant from paying, obtained from a State court, in aid of a judgment obtained after the petition in bankruptcy had been filed. — *Morris v. First Nat. Bank of New York*, 15 N. B. R. (Ct. App. N. Y.) 281.

8. It is no defence to an action upon a promissory note, brought by an assignee under a State law, that the assignment by the bank was in contravention of the Bankrupt Law. That question concerns only the creditors of the bank, and can only be raised by them. — *Schryock v. Bashore*, 15 N. B. R. (Sup. Ct. Pa.) 283.

#### POWER OF ATTORNEY.

A power of attorney, by its terms irrevocable, to transfer stocks as security for a debt, is not revoked by the death of the attorney, and the creditor is entitled to the stock as against the assignee, there being no allegation of fraud. — *Lightner v. First Nat. Bank of Strasburg*, 15 N. B. R. (Sup. Ct. Pa.) 69.

#### PRACTICE.

A denial of a motion for nonsuit is not reviewable in error. — *Miller v. Jones*, 15 N. B. R. (C. Ct. N. J.) 150.

#### PREFERENCE.

1. It is immaterial what a creditor thought or knew about the debtor's intention in transferring property to him, if the creditor had reasonable cause to believe the debtor insolvent, and knew that the transfer was made in fraud of the act. — *Webb v. Sachs*, 15 N. B. R. (Oreg. Dist.) 168.

2. Where an act operates as a preference the law presumes the intent to give such preference. — *Ibid*.

3. A confession of judgment when actually followed by an execution and seizure of the debtor's property, is an unlawful preference within the meaning of the act, if made with a view to prefer such creditor. — *Ibid.*

4. To enable an assignee to recover against a party who has obtained a fraudulent preference, he must prove that the debtor was insolvent, and that, being so insolvent, he procured his property to be seized by the defendant, with intent to prefer him over his other creditors, and that defendant accepted such preference with reasonable cause to believe that the bankrupt was then insolvent, and also knew that such seizure was made in fraud of the Bankrupt Law. — *Ibid.*

5. Transfers of property will not be held preferences and void, when it appears from the evidence that the creditor had no intention of obtaining or the debtor of giving a preference. — *Harmanson v. Bain*, 15 N. B. R. (E. D. Va.) 173.

6. A mortgage executed eighteen days before the filing of the petition in bankruptcy, but in pursuance of an oral agreement between the bankrupt and the guardian made more than fifteen months before, is not a preference, and cannot be set aside by the assignee. — *Burdick v. Jackson*, 15 N. B. R. (Sup. Ct. N. Y.) 318.

See ACTION, 2; PRIORITY, 1; PROOF, 4.

PRESUMPTION. — See PREFERENCE, 2.

#### PRIORITIES.

1. A savings bank having suspended, shortly after advertised that it would resume business on a named day "by receiving special separate deposits in trust to new account, pledging the bank to use the deposits only in payment of checks against that new account, and as fast as the bank can collect and realize from the loans and securities to pay *pro rata* instalments on its present indebtedness." Deposits were made, but the bank soon failed, and was adjudged bankrupt upon a creditor's petition. *Held*, upon petition of a new depositor to be paid in full, as a preferred creditor, that the new deposits were not special deposits, that they having been paid in over the counter, and no pains taken to separate them from other moneys, or to preserve their identity, no lien was preserved at the time of the deposits, that no legal preference could arise under the advertisement, and that the petitioner stands as a general creditor, to be paid, *pro rata*. — *In re Mutual Building Fund Society, &c. Ex parte Beatty*, 15 N. B. R. (E. D. Va.) 44.

2. A claim by an attorney for services to the bankrupt in defending a suit before bankruptcy, and one for preparing his petition and schedules, and filing the same, are not claims entitled to priority. — *In re Handell*, 15 N. B. R. (W. D. Tex.) 71.

3. Where a general assignment, valid under the State law, was set aside by proceedings in bankruptcy, the assignee is entitled to the proceeds of the assets, though the same have been sold upon execution levied before the commencement of proceedings in bankruptcy and after the assignment. — *In re Biesenthal*, 15 N. B. R. (N. D. N. Y.) 228.

4. Fees of an officer in the attachment of property, dissolved by proceedings in bankruptcy instituted within four months, as a general rule, will not be

allowed unless the attachment concerned the property and benefited the creditors. — *In re Jenks*, 15 N. B. R. (Dist. Min.) 301.

PRINCIPAL AND SURETY. — See ACTION, 3.

#### PRIVILEGED CLAIM.

Where a debtor prior to his bankruptcy, and within the time named in section 5101, employed an expert to "straighten out" his books, and put his accounts into a presentable and intelligible shape for himself and bankruptcy, such person may be considered as a clerk, and entitled to priority. — *Ex parte Rockett*, 15 N. B. R. (Mass. Dist.) 95.

PROMISSORY NOTE. — See INVOLUNTARY PETITION, 4.

#### PROOF.

1. A claim for damages for deceit practised by a partner in relation to the firm's financial condition, is not a claim provable in bankruptcy. — *In re Schuchardt*, 15 N. B. R. (S. D. N. Y.) 161.

2. The warden of the State prison deposited, in his name as warden, moneys appropriated by the State for the support of the prison, in the bankrupt bank, the directors of the prison having previously arranged with the bank for such deposits, and agreed upon the form in which the account should be kept. There was no law requiring the warden to make the deposits, nor designating this bank as a depository, and the State had a bond from the warden. *Held*, that the money was still the State's, and it could prove against the bank for the balance. — *In re Corn Exchange Bank*, 15 N. B. R. (E. D. Wis.) 216.

3. Proof of claim by a State should be made by some officer holding a relation to the State similar to the relation a president, cashier, or treasurer bears to a corporation of which he is such officer. — *Ibid*.

4. Where a creditor who has received a preference had reasonable cause to believe the debtor insolvent, and knew that a fraud on the act was intended, he can prove but a moiety of his claim. — *In re Schoenenberger*, 15 N. B. R. (S. D. Ohio) 305.

5. But upon voluntarily offering to restore the preference, there being no actual but a constructive fraud only, the creditor will be permitted to prove his claim in full, and share in common the dividends. — *Ibid*.

See FRAUDULENT PREFERENCE; PARTNERSHIP, 3; CONTRACTS, 1.

#### PROVABLE DEBT.

1. Where a claim originated in contract, although fraudulently induced, and is prosecuted in an action sounding in damages, it continues to constitute a provable debt, even though the fraud must be proved to entitle the plaintiff to recover. — *In re Schwartz*, 15 N. B. R. (S. D. N. Y.) 330.

2. And such debt comes within the provisions of section 5106 Revised Statutes, which prohibits the prosecution to final judgment of any suit against the bankrupt, founded upon a provable debt, till the question of his discharge shall have been determined. — *Ibid*.

3. Whether the claim has been proved in bankruptcy or not does not affect the question of the right to prosecute the action. — *Ibid*.

## REASONABLE CAUSE TO BELIEVE.

Reasonable cause to believe, is knowledge of such facts and circumstances in regard to the matter in question as would put a prudent man upon inquiry. — *Webb v. Sachs*, 15 N. B. R. (Oreg. Dist.) 168.

RECEIVER'S BILL. — See LIEN, 2.

## REGISTER.

1. Registers may designate the newspapers in which the notice of a sale by an assignee may be published. — *In re Burke*, 15 N. B. R. (S. D. N. Y.) 40.

2. The register is an officer of the court, and, as such, he cannot act independently of its judgments or decrees, but must take notice of them. — *In re Scott*, 15 N. B. R. (E. D. Mo.) 72.

3. A register has no power to vacate or reopen a dividend, duly declared for the purpose of paying a claim, which was not proved, or filed or presented before the day appointed for the dividend meeting. — *In re Smith*, 15 N. B. R. (W. D. Tex.) 97.

4. Nor to pay a claim for services rendered the assignee in the nature of a preferred claim. — *Ibid.*

5. The register to whom is referred the question whether the requisite number of creditors have joined in an involuntary petition, should return a list of the claims counted and of those rejected. — *In re Lloyd*, 15 N. B. R. (W. D. Pa.) 257.

6. He is not bound to consider claims that are not distinctly liabilities of the debtor, or that may not be shown to be such without resort to the aid of extraneous proceedings at law or in equity to ascertain the interest of the creditors. — *Ibid.*

See COMPOSITION, 1; EVIDENCE, 2; FEES.

REVIEW. — See STATUTE OF LIMITATIONS.

SALE. — See REGISTER, 1.

## SCHEDULES.

The crime of wilfully and fraudulently omitting assets from schedules is not "infamous," and therefore not within the prohibition contained in the Fifth Amendment to the National Constitution. — *United States v. Block*, 15 N. B. R. (Oreg. Dist.) 825.

See NOTARY PUBLIC.

## SECURED CLAIM.

Endorsement of a note by a third person does not make the claim secured. — *In re Broich*, 15 N. B. R. (E. D. Wis.) 11.

See COMPOSITION, 5; INVOLUNTARY PETITION, 1, 5.

## SET-OFF.

If a creditor, in making proof of his claim before the register in bankruptcy, omits to show that the bankrupt has an unsatisfied claim against him, he cannot, when sued by the assignee for the amount of such unsatisfied and omitted claim, plead as a set-off the amount allowed by the register as a balance due him. — *Russell v. Owen*, 15 N. B. R. (Sup. Ct. Mo.) 322.



SHERIFF. — See INVOLUNTARY PETITION, 11.

SPECIAL DEPOSIT. — See PRIORITY, 1.

STATE COURTS. — See JURISDICTION, 3.

#### STATUTE OF LIMITATIONS.

1. The limitation of two years, in section 2057, does not apply to proceedings for reviews in cases in equity. — *Wilt v. Stickney*, 15 N. B. R. (N. D. Ohio) 23.

2. The Statute of Limitations in North Carolina begins to run from the date of adjudication against any purchaser of the *choses in action* of the bankrupt at the sale by the assignee, whether the purchaser be the bankrupt or a stranger. — *Blackwell v. Claywell*, 15 N. B. R. (Sup. Ct. N. C.) 300.

TENANT IN COMMON. — See PARTNERSHIP, 1.

TORT. — See FRAUDULENT TRANSFER.

TRADER. — See INSOLVENT.

TRUSTEE. — See INVOLUNTARY PETITION, 15.

USUAL AND ORDINARY COURSE OF BUSINESS. — See EVIDENCE, 4.

WAIVER. — See INVOLUNTARY PETITION, 1.

WARRANTY. — See DISCHARGE, 1; EVIDENCE, 1.

#### WITNESS.

1. A witness is allowed fees for days he actually attended court, and not for days he was ready to attend. — *In re Crane*, 15 N. B. R. (W. D. Tex.) 120.

2. A certificate of the clerk of the court is only *prima facie* evidence of the number of days a witness attended before a register. — *Ibid.*

## BOOK NOTICES.

*A Treatise on Crimes and Misdemeanors.* By Sir WILLIAM OLDNALL RUSSELL, Knt., late Chief Justice of Bengal. By CHARLES SPRENGEL GREAVES, Esq., one of Her Majesty's Counsel. Ninth American from the Fourth London Edition, with the Notes and References contained in the former editions, and with additional Notes and References to English and American Decisions. By GEORGE SHARSWOOD, LL.D. In three volumes. Philadelphia: T. & J. W. Johnson & Co. 1877.

IF we were called upon to decide which is the best English book on criminal law, we are inclined to the belief that we should give our suffrage in favor of Russell on Crimes and Misdemeanors; for, though it treats only of indictable offences, not including treason, it gives us substantially Hale, Hawkins, Foster, Blackstone, and East, illustrated, qualified, explained, and limited by the later decisions and statutes. We think the British lawyer ought to be satisfied with the fifth edition of the work just published in England, and containing the latest decisions both upon common law and statutory crimes. Probably the fourth edition of the work when it was published (in 1865) was equally satisfactory. But we cannot say that the American lawyer ought *now* to welcome the fourth edition, nor do we think it quite reasonable that the publishers should ask them to accept it as meeting their just expectations. It was, to say the least, an inexcusable inattention for the publishers to bring out in this country what was at the same moment being discarded in England. We say inattention; for we cannot for a moment suppose, that, had the American publishers known that a new edition of the work was already in press, or about to be put to press, in England, they would have thought of publishing an edition of twelve years' earlier date. And we must be permitted to say that we are surprised that the enterprising publishers seem not to have been aware of the fact. Much as they have done for the profession, the profession has done as much at least for them; and have, we think, the right to demand such a reasonable degree of vigilance as will insure them against such mischances. If we are to have reprints with American notes, let us have the latest and best form of the reprinted work. Nor can we think that this work is now, or ever has been, well annotated. It was a good book from the start, and has had the misfortune of being edited by men of distinction. The names of Daniel Davis, Theron Metcalf, and George Sharswood, the successive editors of the several editions, are distinguished in the annals of our jurisprudence. But we venture to affirm that their distinction did not in any respect arise out of the manner in which their editorial duties were performed. We are, indeed, half inclined to believe that the editorial relation arose out of the distinction already achieved. Will the publishers permit us to suggest that the best editorial work is done, not by the already learned and distinguished jurist, whose time is occupied by graver and more lucrative pursuits, but

by the ambitious, enthusiastic, and half-occupied young lawyer? Were we to engage in the publishing business, we should lay it down as a maxim, that no book would be well edited unless the editor had reputation to make and time to throw away, so far at least as immediate and direct remuneration is concerned. However, we are not publishers, and do not expect to be. We are chiefly concerned in the quality of books that we are solicited to purchase. That these should be the best that circumstances will permit, we have a right to ask; and we also have a right to expect that we shall be dealt with candidly and fairly.

Literally speaking, this may be the *ninth* American edition reprinted from the *last* (fourth) English edition. But the *fifth* English edition, greatly enlarged, and fairly showing the history of criminal law in England during the lapse of the twelve years which have intervened since the publication of the fourth edition, was in the hands of the profession on this side the water as early as January last; and, as we have already said, ought to have been known to the publishers of this so-called *ninth* American edition. We observe that some of our cotemporaries are seriously questioning whether so many *editions* have been published in the United States as is claimed. Now, without entering into the controversy at all, we may be permitted to say, that, after a careful examination and comparison of the so-called seventh and eighth editions, we were enabled to discover, contrary to our first impression, that they were not absolutely identical. But we discovered also that our impression, that they were substantially identical, was correct. As to this ninth edition, we find that it differs from the eighth in some respects. For instance, the notes of the several American editors, which were distinguished by separate marks, and distributed to their appropriate places through the different pages of the text, are consolidated into one general note, without the distinguishing marks. And these consolidated notes might as well, so far as convenience is concerned, have been placed at the end of the several chapters, or of the text upon the general subject treated on, as at the places assigned them. Examples of this may be seen at \* pp. 12, 13, 50, 62, 67, and, indeed, all through the work. This, of course, is but a change in form; and, it seems to us, in every respect, except the possible saving of space, a change for the worse. As to the annotations, the seventh edition, which was published in 1853, has also the editor's advertisement to the fifth edition, which is dated December, 1844, and states that "the references to American authorities have been carefully brought down to the present time." Substantially the same statement is made with reference to the eighth and ninth editions, dated in the last, November 1876. The almost absolute identity of the seventh and eighth editions, we have already adverted to. There are a few, a very few, new notes in the ninth edition which are not in the previous editions; while some notes, — as, for instance, those at \* p. 44, — of equal or greater value, are omitted; the reason wherefor we cannot divine. New cases, or rather cases most of which were not, but ought to have been, in the eighth edition, may be found in the ninth, but in numbers inconsiderable when compared with the whole number of American cases decided during the period covered by their several editors. But we have found no case, leading or otherwise, — and we have with some care looked through the first volume, and cursorily through the others, — decided since 1871. A

glance at any of the Digests, or at the last edition of Bishop's Criminal Law, will show that hundreds of criminal cases have been decided since that time about which no lawyer having in charge a criminal case could safely be ignorant. There are also many cases decided prior to that date which we should expect to find, but do not find; so that the work does not present, and never has presented, such a statement and illustration of the criminal law, as applied in this country, as seems to us indispensable to the American lawyer. We suppose that to-day the American criminal cases are more numerous than the English; but we apprehend that a table of the cases cited in the notes to this work would give a vastly different impression. According to our notion of what would fairly be expected, in any properly edited foreign book, these cases should appear either in a separate table or consolidated with the other cases. Nothing of the kind has, however, been done. Nor, though we should expect some new matter and not a few differences of opinion amongst so many tribunals, do we find any traces of them in the Index. In short, it seems to us that it cannot be said that the book is, or ever has been, well edited, — from the stand-point of the necessities of the American lawyer.

If we had space to enter into specific criticisms upon the actual notes, we should be obliged to say, that the very first note, on page 1, on attempts to commit arson, is exceedingly lean and totally unsatisfactory. It cites one case, *State v. Wilson*, 30 Conn. 500, and briefly and accurately enough states the principle of the case, and adds, "See *People v. Lawton*, 56 Barb. 126." This is the whole note upon a subject which, recently, in connection with the crimes of picking pockets, burglary, procuring abortion, and rape, has been much discussed, and wherein the distinction between attempt and intent is very fine and very important. The cases are numerous, recent, and valuable, as may be seen in Mr. Bishop's chapter on this subject (ch. li.). In the also very jejune note on insanity (p. 13), it is said that the burden of proof, according to the general current of decisions, is upon the prisoner. We do not so understand the law. But, at all events, no mention is made of the most recent and important cases, such as *Flanagan v. People*, 52 N. Y. 467; *Lynch v. Commonwealth*, 77 Pa. St. 205, *pro*: and *Commonwealth v. Pomeroy*, 117 Mass. 143; *State v. Jones*, 50 N. H. 370; *State v. Crawford*, 11 Kan. 32; s. c. 23 Am. Law Reg. 21, and notes, *con*. The very elaborate and able opinion of Mr. Justice Foster in *Hardy v. Merrill*, 56 N. H. 227, showing the admissibility of the testimony of non-experts on questions of sanity, one of the most valuable opinions of recent date, we have not been able to find. Nor do we think the note in vol. iii. p. 278, to which we turned at random, is at all an adequate expression of the present state of the law on the question how far evidence of other offences may be given in proof of the one charged and on trial. But we must stop fault-finding with this book, or it will become chronic. We regret that we have felt obliged so to notice a good book, which, if it has not been too much published, has certainly been too little edited.

*A Commentary on the Law of Evidence in Civil Issues.* By FRANCIS WHARTON, LL.D. 2 vols. Philadelphia: Kay & Brother. 1877.

THIS is an elaborate, philosophical treatise, interesting to the student for its thorough discussion of principles and the care with which the history of the

rules in this department of law is traced, and valuable to the general practitioner for its wealth of illustration and fulness of authorities.

The author states that the book is designed mainly to meet the following changes in the law of evidence: 1, The admission of parties and other interested persons as witnesses; 2, The disuse of special pleading and the almost unlimited liberty of amendment in civil issues; 3, The tendency in American jurisprudence, according with the express provisions of the recent Judicature Act in England, towards the adoption of the principles of equity evidence in administering common law; 4, The tendency to determine the question of relevancy "by the law not of formal jurisprudence, but of free logic;" and 5, To the great change in the rules as to presumptive proof. The author himself is evidently in full sympathy with all of these changes, and the spirit of free logic is unquestionably the main characteristic of the work. In reviewing the changes to which Dr. Wharton alludes, one is struck with the great reforms accomplished within the last twenty years. Yet, after all, they have been almost without exception merely the removal of the artificial rules, refinements, and subtleties which the learned men of former generations had built up. In law, as in religion, the unerring tendency has been and is to simplicity. So far, and so far only, as doctrines, statutes, and rules, in the one, and doctrines, rites, and forms, in the other, can stand the test of free inquiry and logic, and can approve themselves as necessary and worthy means to promote a practical administration of justice and a practical development of the religious life, do they stand, and will they stand. Already, how remote seems the time when a pecuniary interest in a suit disqualified a witness! Who would propose to-day to re-establish the rules under which, nevertheless, generation after generation of great lawyers and logicians practised?

We return to our author to remark on what we deem blemishes in his admirable work. There is at times a certain diffuseness of style, though his discourse is so entertaining that we cannot seriously complain of that. But we do object to such matters as the frequent long extracts, — mostly in the notes, however, — from Chief Justice Cockburn's charge in the *Tichborne* case (a charge which, we may say in passing, while certainly a masterly presentation of the facts, was to our thinking so conspicuous an illustration of bias that an American judge would almost be impeached for making it), anecdotes or reports of trials in inferior courts culled from the newspapers, and similar extraneous matters, which, however interesting in themselves, do not seem to accord with the general character of the book, and take up valuable space. We regret this the more because a large number of the authorities are so cited that slight clue is given to the precise point of the decision. Again, we object to some of the terms constantly used, — "Anglo-American" courts, for instance, meaning English and American courts; "contractually," meaning "as a contract," &c., — and to such grammatical inaccuracy as the adjective "independent," when the adverb "independently" should be used. To the ordinary reader such a sentence as this is rather appalling: "The credibility of a self-dis-serving, non-contractual admission, therefore, is a question of fact, resting on the presumption that no prudent man would declare an untruth to his own disadvantage."

It escaped the author's attention that, since chapter 393 of the Act of 1870 of

Massachusetts, a party to a suit or contract is no longer precluded from testifying in the courts of that State because of the death of the other party. Some remarks in the text and notes of vol. i., pp. 435, 444, 445, 446, need to be corrected in that respect.

We are unable to say whether Mr. Wharton has incorporated into this book the product of the labor of other men without acknowledgment; but, our attention having been called to the complaints of our contemporary, the *London Law Times*, with reference to his treatise on Agency, we take occasion to say, that, when an author sees fit to adopt the exact phraseology of another writer on the same subject, and to rely upon that other's examination of authorities so entirely as even to repeat a misprint in the name of a case cited, it is esteemed at least graceful to indicate, by some reference to its source, that the language is not original.

*United States Reports, Supreme Court*, Vol. XCIII. Cases argued and adjudged in the Supreme Court of the United States, October Term, 1876. Reported by WILLIAM T. OTTO. Vol. III. Boston: Little, Brown, & Co. 1877.

THE merits of Mr. Otto's reporting have been dwelt upon in our notice of his first two volumes. It is a long way from perfection, however, as yet. Even the bad taste of some of Mr. Wallace's statements of facts did not prevent their being better than none at all. To do them justice, they often led the reader up to the points in discussion with great clearness, and in a way which showed a sincere effort to do his duty. Mr. Otto has probably felt warranted, in his frequent omission of all statements, by the precedent of the condensed series of reports to which judges of the Supreme Court have lent the sanction of their names. The authority is not sufficient, especially where the arguments of counsel are reported. In such cases it is most unsatisfactory to be told that the facts are stated in the opinion of the court. Simply, as regards the form of the report, most readers like to begin to read it at the beginning. If the court has made an exhaustive statement, not interwoven with the discussion which the reporter desires to use, he might be authorized to detach it, and print it before the arguments, if he sees fit, as Mr. Otto has done in *Tipppecanoe County v. Lucas*, pp. 108, 113. But this can rarely be done with safety; for even courts sometimes push analysis to the point of eliminating material circumstances.

Mr. Otto, like many other reporters, is not particular to give the names of all the parties to the cause. In our opinion, this should be done at the outset, in every instance. His manner of citation is still open to criticism. "*Cox et al. v. Butt et al.*" should be "*Cox v. Butt.*" "*Assignee*" and the like should be omitted; and, although it is open to the objection of misstating the parties, it is settled as the best practice to cite "*Allen's Executor*" (or "*Lessee*" and the like) v. "*Allen*" simply as "*Allen v. Allen.*" The following are simply barbarous: "99 Eng. Com. Law Rep. (Phila. ed.) 564;" "Law Reports, division 1, Chancery, 1876, part 4, April 1; vol. i. p. 573." The reporter of the highest court in the country ought to know that the citation of English reports by a title unheard of, except as an American bookseller's device, is wholly improper; and ought to be able to refer to 1 Ch. D. 573 in

less than a line of print. We must add, that we doubt if the citations are verified in the proofs as they should be.

It is not our intention to speak of the decisions at length. But, with all our respect for a tribunal the importance and delicacy of whose functions do more to impress the imagination than even the unbroken traditions of near a thousand years, we cannot disguise from ourselves that they do not come to us with the weight which the judgment of the court carried in the days of Marshall and Story and Taney. Of late years, there has been such freedom of dissent as to leave the impression of insufficient or too long-deferred consultation. This may be explained by the pressure of greatly increased business. But it must continue to be a source of regret, and should stimulate the profession to devise some means of lightening the constantly increasing demand upon the court.

*Commentaries on the Liberty of the Subject and the Laws of England relating to the Security of the Person.* By JAMES PATERSON, Esq., M.A., Barrister-at-Law, sometime Commissioner for English and Irish Fisheries, &c. In Two Volumes. London: Macmillan & Co. 1877.

THE author of these Commentaries is, we surmise, an omnivorous reader of English literature, and the patient and industrious editor of an *index rerum* in many volumes; all of which have been here munificently poured out, and for the use of an uncertain class of individuals, — not philosophers, for them the work is too common-place; not students of history, it is too desultory; not lawyers, it is too vague and inaccurate.

At the outset, the author wanders over some forty pages in the endeavor to define what law is; embellishes his margins with copious excerpts from distinguished writers of all kindreds and tribes and tongues and peoples, from Aristotle to Austin, from Bracton to Bishop, and so along the alphabet to perhaps Zeno and Zoroaster; and then occupies a larger space in dividing his subject to his taste. When he at last touches English ground, he startles us with this statement: "The English common law was chiefly based on the Roman law, and Bracton scarcely introduces a new principle not found there."<sup>1</sup>

This drove us at once to the original, and, in company with the reverend pundit, we found a small and handsome modern, bearing the name of "Bracton and his Relation to the Roman Law," by Prof. Carl Güterbach: Translated by Brinton Coxe."<sup>2</sup>

The German author is quite sufficiently strenuous in claiming all that may be due to the Romans; but he says, —

"While the principles of the *corpus juris* were adopted, without hesitation, for movable property, by Bracton and the English lawyers of his time, the progress of the Roman law towards influencing the law of immovables was checked by the powerful obstacle of a legal system, already fully developed and complete within itself, which had grown up on purely feudal foundations, and which was thoroughly penetrated with the spirit of the feudal polity. Some particulars were, indeed, borrowed from the Roman law; but its fundamental principles were unaffected by any contact with the Roman law and its influence. Hence arose the difference existing

<sup>1</sup> Vol. i. p. 110.

<sup>2</sup> Phila. 1836.

between the Roman and the English laws, even in their fundamental notions of the right of property and of rights or interests in things."<sup>1</sup>

And the translator, in his preface, adds, that —

"Even so recent a writer as Professor Maine holds 'Bracton's Relation to the Roman Law' to be among the most hopeless enigmas of jurisprudence."

It may be said that the author meant to confine his statement to the law respecting persons and personalty, and perhaps he did; but he does not disclose his purpose if he had it. And when, as in Bracton's day (say A. D. 1257), seven-tenths of the population were slaves, and the law was chiefly administered by lords of manors, it is hardly supposable that that law was derived from very recondite sources. The suitors in most cases had too few "movables" to allow them to appeal to the king's tribunals, and consequently but slight interest in the nature or sources of the doctrine there prevailing; so that the law, as then known to the vast majority of the people of England, was practically an expression of the views of feudal proprietors, — various enough, at any rate, and not the less so because not one in a thousand of those proprietors had ever seen a law-book, or could have read it if he had. And what indeed was a law-book before the invention of printing? It must have been a comfort that there were but few of them.

When the author sets himself to the task of particular definition, he begins one important paragraph thus: "The words 'right' and 'wrong,' when used as terms of legal art, *have nothing in common* with the same words as used by moralists and divines."<sup>2</sup> He thinks it very important to the credit of England that her laws should be codified, and that this is no very arduous task. He says: —

"It has been forgot that the public would be satisfied with any summary well arranged, set forth in language of moderate perspicuity, issued under the authority of the State, which can always be relied upon to command at pleasure any amount of clear thought and perspicuous language on any subject capable of being addressed by one intelligent being to another. So long as this summary can be relied upon to help the public with its moderate details, it need not be considered what credit, if any, the legal profession need give to it. If it is right, it will soon establish its authority even with lawyers; if wrong, the same hand that made it wrong will soon make it right."<sup>3</sup>

And we have selected this passage out of a long disquisition on the subject, in order to indicate the degree of profundity in philosophy and of precision in thought with which the commentator is gifted. When the Consul Mummius decreed, that, if any of his soldiers should injure a statue or other work of art from plundered Corinth, the offender should replace it with a new one of his own manufacture, he showed a confidence in human capacity in general, of which we are here reminded. The difficulty of expressing, in statute form, the true intent of the law-maker is matter of every-day remark, and has given rise to a favorite phrase used in connection with many an act, that one can drive a coach and six horses through it. Some think that force is added to the expression by an increase in the number of ideal cattle; and he who first rose to the grand suggestion of a Mecca caravan was supposed to have reached the climax of felicitous hyperbole. The misfortune of the illustrative obser-

<sup>1</sup> p. 86.

<sup>2</sup> Vol. i. p. 176. The Italics are ours.

<sup>3</sup> Vol. i. p. 171.



vation consists in its extreme inapplicability; and we have never been able to accord to it our sanction. It probably arose from the fact (at first blush, not germane to the matter) that some practitioner had been so successful in enabling his clients to elude the provisions of law, that he was able to signalize his prosperity by the mode of travelling alluded to.

(Imagination should be lightly curbed in juridical literature. We have a valued friend who was once nearly frightened away from his professional studies by encountering the terrific phantom of "a fee mounted upon a fee, with a double aspect." His active fancy depicted at once a "chimæra dire," of portentous shape, little short, indeed, of "the dreaded name of Demogorgon." Blackstone should have been too considerate of his readers' nerves to quote such grewsome phraseology.)

What is a statute but, so far as it goes, a code? And how far has the English mind shown itself skilful in extinguishing questions by parliamentary fiat? Mr. Causten Browne has won the thanks of the profession, by giving us a large volume containing in brief the result of the almost unnumbered controversies that have attended the interpretation of a single statute. No one of our readers will ever forget the name of the great case of *Cholmondeley v. Clinton*, cited to one or another of hundreds of points in the margins of thousands of law-books. And yet there was no intricacy or complexity in the rules of law which governed the main question in that case. Those rules were two of the most familiar: that, in interpreting a deed, the intention of the parties shall prevail, if it can be carried out consistently with the rules of law; and that, where technical language is used, it must be interpreted according to its technical meaning. The material facts, too, were undisputed. Lord Orford, being the only child of two only children, wished to dispose of the property he had derived from his mother, so that it should eventually return to her family, and explicitly so declared in the deed which was destined to be so famous. At the end of this deed, he settled the estate upon the right heirs of his maternal grandfather, Samuel Ray. But he was himself the right heir (or heirs) of that ancestor; and, if his language at the end of the deed was to be interpreted technically, then his intention declared at the beginning was frustrated, and he had in fact and in law done nothing whatever, except signing his name to a document which was in effect blank. The Court of Chancery, which had jurisdiction, sent the case first to the King's Bench, and next to the Common Pleas, and the judges of each of those Courts were divided in opinion as to whether the intention or the rule of law should govern, and, after many years of discussion, in presence of many vice-chancellors and other high magistrates, it was finally decided that, although the statutes of limitation were not recognized in equity, yet the defendant had possessed the land so long that it would be inequitable to disturb him, and he accordingly had judgment; but the great question in the case was never settled. Here certainly was a predicament from which codification would have afforded no escape. But, in any case, a knowledge of the law must include a practical acquaintance with the subject-matter on which it is operative. A Philadelphia lawyer, though proverbially incapable of perplexity in general, might well find himself slow to comprehend the common law which has grown up in our own day, under the prompt and efficient sanction of the rifle, among the miners of California; and a clear-headed lawyer

bred among those miners might easily be embarrassed by an adjustment of average, and perhaps imagine at first that a bottomry bond must be nearly connected with a sister keelson, — if indeed the latter were not to be sought for, like a ship's husband or her mate, under the title "Domestic Relations." We do not intend, however, to discuss here the great question of the expediency of codifying the law; and, if we have been drawn into intolerable irrelevancy, we beg to plead the example of the company we have been keeping. This irrelevancy, indeed, is one of our author's most conspicuous weaknesses. He rambles on after his first two hundred pages pleasantly enough; but cannot help taking frequent pinches from his *index rerum*, and giving us occasionally a statement of the views of law entertained by the ancient natives of Corea or Chili, Pegu or Peru, which have no tendency to illustrate the system he purports to be examining. He gives a copious account of the poor-laws of England, which contrasts much to his disadvantage with the masterly treatment of the same subject by Mr. Edward Brooks in the *North American Review*.<sup>1</sup> There is, however, not much to complain of, except mere inadequacy, till we reach the suggestion<sup>2</sup> that "the English poor-laws form a noble monument of modern civilization;" although in the author's opinion sufficient pains have not been taken to make them intelligible and familiar to those who are chiefly interested in their operation.

On the other hand, we believe it is the almost uniform testimony of the best writers, English as well as foreign, that the poor-laws of England are *the* blunder of the nation; and that the system, persisted in for centuries,<sup>3</sup> of allowing the landowners to fix the wages of the laborers, and preventing the latter from leaving the parishes to which they belonged, has resulted in an amount and degree of human degradation and misery almost, if not absolutely unparalleled, in this not over-happy world. After reading that testimony (we may here perhaps interpolate), Mr. Froude's eulogy of the Eighth Henry's dealings with his "valiant beggars" sounds sufficiently absurd. Our commentator is evidently a kind-hearted and cultivated gentleman; and we are unwilling to insinuate that he has plagiarized from the didactic captain of Messina's watch. But he does say<sup>4</sup> (and the paragraph suggests his notion of "moderate perspicuity") :—

"It has been laid down that if a person flee for felony, and defend himself so that he cannot be taken, the officer may kill him. This is, however, so extravagant a proposition that the strictest proof of necessity for such an extreme measure, and of the legality of the warrant acted upon, is demanded, and ample notice of what the crime is for which the arrest is sought to be made. And, even with all these preliminaries, it is scarcely possible to comprehend on what rule of law or justice it can be necessary to slay an escaping offender; since all men, whether good or bad, prefer liberty to imprisonment, and that is part of the law of nature, — if any such law exists or ever existed."

D—y clothes the same sentiment in terser language: "Indeed, the watch ought to offend no man; and it is an offence to stay a man against his

<sup>1</sup> Oct. 1870. "English Aristocracy and English Labor," p. 852.

<sup>2</sup> Vol. ii. p. 119.

<sup>3</sup> From the time of Edward III. till a recent period.

<sup>4</sup> Vol. ii. p. 159.

will." The coincidence is certainly striking, — the author and our old friend D. concurring in the idea that the chief thing to be considered in such cases is the feelings of the man who ought to be arrested.

We should be glad to tender to the enterprising expositor a cordial farewell, with an expression of our best wishes; but we gather doubtfully (and in perusing his book we gather in like sort a good many things) from the preface that he intends not to stop with these two volumes, but to go on improving upon Blackstone to an undefined extent; and so we content ourselves with recommending "any gentleman who chances to be curious about Christian burial" to read the elaborate and really entertaining chapter respecting that subject with which the second volume closes. Indeed, that is the better end of the work to begin at, for any purpose.

*Massachusetts Reports.* Vol. CXX. Cases argued and determined in the Supreme Judicial Court of Massachusetts. March—September, 1876. JOHN LATHROP, Reporter. Boston: H. O. Houghton & Co. 1877.

THIS volume appears with the usual promptness of this reporter, and in the general excellence of the reporter's work is like the rest of his series. It contains a great many cases of considerable interest to the profession in Massachusetts, and a few of general importance. There are some that might well have remained unreported, if either custom or law had given the court or reporter the right to omit them: the number of cases carried up on small points, which have been settled, suggests that there may be reasons for taking exceptions other than any real doubt of what the law is. Whether this is done for delay, or for ambition to get into the reports, or because the Superior Court holds no law sessions, and the rulings there are ordinarily subjected only to such consideration as can be given after a brief discussion in the midst of a hurried trial, — the fact is plain enough, that the Massachusetts Reports contain too many cases of little interest to the profession; and this fact is apparently recognized by the court in the short and decisive way in which such cases are disposed of. Some cases of interest are the following: —

In *Snell v. Dwight*, p. 9, there is an elaborate and able opinion, dismissing a bill in equity brought for an account of resulting profits from illegal trading with the inhabitants of States declared to be in insurrection against the United States. In *Dunham v. Presby*, p. 285, the same doctrine is enforced in a case where the defendants did not set up the illegality; the court holding that no waiver or consent by them could oblige the court to determine their rights under an illegal contract.

*Providence Tool Company v. United States Manufacturing Co.*, p. 35, decides that to ask on direct examination a witness, "whether or not he had authority to make the note, &c.," is inadmissible, as involving the witness's opinion upon matter of law, express authority not being claimed. Such a decision was needed, for some judges habitually admit questions like this.

In *Pearson v. Mason*, p. 53, a part of the head-note is this: "Upon a contract by the defendant to purchase certain stock, then owned by the plaintiff, at his request, for an agreed price, and a tender of the stock before an action is brought, and a renewal of the tender at the trial, the plaintiff is entitled to

recover as his damages the whole price that the defendant agreed to pay.' This extraordinary decision is put simply upon the authority of *Thorndike v. Locke*, 98 Mass. 340; and *Thompson v. Alger*, 12 Met. 428. The opinion in *Thorndike v. Locke* is "by the court." It is difficult to say whether, in Massachusetts, an opinion "by the court" is of any authority. In *Davis v. The Inhabitants of Dudley*, 4 Allen, 557, 562, Mr. Justice Merrick, in delivering the opinion of the court, says: "There are expressions attributed to the court in the report of the case of *Howard v. North Bridgewater*, 16 Pick. 189, from which it would appear, without particular scrutiny, that an opinion different from that now expressed was then entertained by the court . . . And, as the opinion of the court does not appear to have been *written* or *prepared* by any of its members, it is possible, and perhaps probable, that the reporter introduced into his report the expressions referred to, without the explanations and qualifications which accompanied them." The opinion in *Howard v. North Bridgewater* is a somewhat elaborate *per curiam* opinion. Can it be that the court hand over to the reporter the easy cases for decision, perhaps to try whether he will in time be fit for promotion to the bench? But whether *Thorndike v. Locke* is an authority or not, it rests solely upon *Thompson v. Alger*. Now, *Thompson v. Alger* was decided on its own peculiar facts. The court say (pp. 443, 444): "The plaintiff is entitled to recover the whole amount stipulated to be paid for the stock. The argument against such recovery is that this stock was never accepted by the defendant; that this, at most, was a mere contract to purchase; and that the defendant, having repudiated it, is only liable to pay the difference between the agreed price and the market value of the stock on the day of delivery. Such would be the general rule as to contracts for the sale of personal property; and such rule would do entire justice to the vendor." "Such would have been the rule in this case, if nothing had been done to change the relation of the parties." The peculiar facts were: "The stock had been transferred to Alger on the books of the corporation; and the vendor having done this in the proper execution of the contract, and before it was repudiated by the defendant, may well insist upon this rule;" that is, the agreed price, "as the measure of damages. Stone fulfilled his part of the contract, and has transferred his interest in the property to the defendant." Now, whether *Thompson v. Alger* was correctly decided or not, the peculiar facts on which the judgment was made to rest, and without which the ordinary rule of damages would have been applied, do not exist in *Thorndike v. Locke*, or in *Pearson v. Mason*. These cases were actions on executory contracts for the purchase of stock, which the defendant refused to accept, and no transfer of the stock had been made on the books of the corporation; so that, according to the opinion in *Thompson v. Alger*, the ordinary rule of damages should have been adopted. The true rule was stated by Parke, B., in *Laird v. Pim*, 7 M. & W. 474-478. "A party cannot recover the full value of a chattel unless under circumstances which import that the property has passed to the defendant." The effect of the rule in *Pearson v. Mason* is to turn an action at law into a suit for specific performance of any contract for the sale of any personal property which, or the symbol of or the evidence of title to which, is capable of delivery, if such action is brought at any time, within the statute of limitations, by the person who

agreed to sell, and there is no security to the defendant, that, after he has been compelled to pay the price, he will get the property. There is no rule of law, or of practice, that requires the plaintiff in the action to put into the custody of the clerk, or of any person, the property itself, to be held for the benefit of the defendant. Such a rule of damages is against every principle of the common law; and, as a method of indirectly enforcing specific performance to the extent and in the manner indicated, would make a court of equity stand aghast. If any such doctrine is to be established in Massachusetts, and still another peculiarity added to Massachusetts law, it ought to be done only after the most deliberate consideration, on the fullest discussion of principles; and, it is submitted, that any such consideration and discussion will explode the doctrine of *Pearson v. Mason*.

In *Whitcomb's* case, p. 118, the report seems to be inadequate to present the case intelligently to persons not otherwise familiar with the procedure of the Common Council of the city of Boston, and the laws relating thereto. The opinion is one of importance.

*Newell v. Horner*, p. 277, is an appeal from a decree of the Probate Court refusing probate to a lost will and codicils; and the opinion is interesting as showing the law and procedure in such cases.

*Sparhawk v. Sparhawk*, p. 390, decides that in a case of divorce or alimony no appeal lies to the full court in matters of fact.

*Partridge v. Hood*, p. 403, contains a full discussion of the law in reference to the illegality of an agreement entered into for the purpose of compounding a misdemeanor.

*Smith v. Boston & Maine R. R.*, p. 490, decides that a person walking in the street on Sunday, not from necessity or for charity, cannot maintain an action against a railroad corporation, through the negligence of whose servants in the running of trains on that day he has been injured. The opinion is by a majority of the court; and the cases cited are actions against towns for defects in the highway, and by a passenger against a common carrier of passengers. Anybody walking in the street on Sunday, not from necessity or for charity, is, it seems, fair game for any other violator of the Lord's day.

*Hilbourne v. County of Suffolk*, p. 393, and *Parks v. County of Hampden*, p. 395, standing side by side, invite comparison. Both are petitions for a jury to assess damages for the taking of land to widen a highway; and the question in each, is, What benefits to remaining land can be set off against the damages occasioned by the taking? It must be admitted, we think, that the opinions do not define the distinction between benefits which are direct and special, and benefits which are common and general, with any more accuracy than was done in *Allen v. Charlestown*, 109 Mass. 243. In *Allen v. Charlestown*, it is said, "that the advantages of more convenient access to the particular lot in question, &c., are direct benefits, &c.;" and "it may be the same, in greater or less degree, with each and every lot of land upon the same street." The fact, then, that all the lots abutting on the street may receive benefit of the same kind does not necessarily exclude it in set-off. *Parks v. County of Hampden* turns on the meaning of the word *general* as applied to benefits; and the report leaves it doubtful in what sense the sheriff used that word in his instructions to the jury.

*Hinckley v. Cape Cod R. R. Co.*, p. 257, is an action of tort for an injury caused by negligence; in which there is a dissenting opinion of the Chief Justice and Mr. Justice Morton. Mr. Justice Lord was absent. A dissenting opinion is so rare in Massachusetts as to be of itself an event of importance; and as Massachusetts is the home of "negligence cases," on the successful prosecution of which a good many people depend, more or less, for a living, any hesitation or doubt on the part of the court is carefully watched. The difficulty of laying down any precise and intelligible rules of law, applicable to the varied circumstances of each case of this kind are undoubtedly great; and the tendency of juries to render verdicts for the plaintiff is well known. Courts have endeavored to do something to keep juries within certain limits, not less on the ground that courts judicially know what is and what is not negligence, when all the facts, including all inferences of facts from other facts, are agreed or found, than, on general principles of policy, that it is not safe to let juries decide such cases upon their own uninstructed notions of right and wrong. In this case, the court divide upon the question of the inferences a jury would be warranted in drawing, in reference to the conduct of the plaintiff, at the exact time and place of the accident, when all the circumstances at that time and place which may affect the question of the case are not known. The plaintiff was killed. It is plain that this case does not settle the law; but, for the present, it is pecuniarily advantageous for railroad corporations not to maim, but to kill.

*Sears v. Hardy*, p. 524, is the well-known case arising under the will of the late Joshua Sears. The conclusion reached is undoubtedly correct, but probably not what the testator intended.

*Caswell v. Cross*, p. 545, shows a commendable leaning of the court against "professional duns;" and may be read with profit by persons who want small bills collected cheap, and without any cost, except out of the amount collected.

The opinion of the justices to the Governor and Council in *Jesse H. Pomeroy's case*, p. 600, shows how politely the court could decline to relieve the Governor and Council from their responsibility in the exercise of the power of pardoning offences vested in them by the Constitution.

There is a certain neatness in the opinions, which especially commends them to the profession. The authorities cited are, usually, those of Massachusetts, England, and of the courts of the United States; and some of the opinions are, apparently, exhaustive of the learning of the law pertinent to them. Lawyers may, perhaps, differ in opinion, whether there is not some danger of relying too much upon authority, and whether a more elaborate discussion of principles, with a larger citation from cases of other States, might not give more interest and breadth to the decision of cases of general importance.

*New Cases, selected chiefly from Decisions of the Courts of the State of New York; with Notes.* By AUSTIN ABBOTT. Vol. I. New York: Ward & Peloubet. 1877.

THIS is the first volume of a new series of practice reports to be published by Mr. Austin Abbott. Mr. Abbott's fitness for the work which he has undertaken has been already established by his former series of similar

reports, and seems to be recognized by the profession in New York. The Council of Law Reporting of the Bar Association of New York recommend the members of that bar, not only to purchase and support Mr. Abbott's new series, but also advise them not to purchase similar reports from any other person. They also state distinctly, that, in their opinion, there should not be any other reporter. The practice of the law under the New York code would seem to be sufficiently puzzling, especially with the new complications and alterations created by recent legislation, without the further distraction of rival and differing reports; and we are not surprised that the lawyers of New York have taken this decided step in endeavoring to remedy one cause of their difficulties.

As the object of this series of reports is to illustrate the practice under the New York code, and as, happily, that mysterious system exists nowhere but in the courts of New York, the principal value of this series is naturally to practitioners in the courts of that State. This volume, however, contains some cases which touch upon questions of more general interest; and to a few of these we shall briefly call our readers' attention. We must protest, however, as we have often done heretofore, against the publication of the reports of decisions of any court, except of those of final jurisdiction. It is too great a burden upon the profession to search through an ascending series of reports, to find out what the final determination of a case has been.

The first case in the book, "*Matter of Donohue*," decided in November, 1876, is an interesting one; and we sincerely hope that it has not been reversed by any of the higher courts. Two children, of tender years, were apprenticed to one Smith, and were employed by him as gymnasts and acrobats in Murray's circus. The children were taken from Smith, and given to the Society for the Prevention of Cruelty to Children. Smith brought a writ of *habeas corpus*, which was dismissed, and the children left in the possession of the society. This decision will encourage a similar society just forming in Massachusetts.

In *Prime v. Twenty-third St. R. R. Co.*, p. 63, the court decides that street railroad companies have no right to make a nuisance of themselves, by heaping up the snow, which they remove from their tracks, in front of anybody's house; but are bound to cart it away at once.

In *Davis v. Davis*, p. 140, Judge Van Brunt carries the law of presumptive marriage as far as it can go without injury to an unsuspecting public. The case is, in many respects, a novel one. Mrs. Davis sues for a divorce; and Mr. Davis sets up in defence a former marriage by Mrs. Davis to one Taylor. The plaintiff's sister, "Pomp," so called, was anxious to have her marry her step-son, Taylor; and, not being satisfied with her promise to do so in two years, was desirous of clinching the promise in some way. They were then living in Texas, and, it appears that the plaintiff, "Pomp," and the future bridegroom went into the Indian Territory for one day, and something, which was vaguely described as a "ceremony," took place in the presence of "Pomp" and a man who preached to the Indians, but who had never been ordained, in which both parties officiated under false names, and there was no evidence that the preacher pronounced them man and wife. They never lived together as man and wife, and the plaintiff told the defendant all the

circumstances of the case before they were married. The court held it to have been a valid marriage, although plaintiff expressly testified that she did not intend it to be a marriage, and never considered herself as married; and a divorce was refused. The judge begins his opinion with a few remarks addressed to the plaintiff's counsel, which seem worth preserving. The counsel in his argument claimed the consideration of the court on the ground that a question of legitimacy was involved. The court says: "I have been unable to appreciate this suggestion, because, perhaps, unfortunately, there has not been a sufficient quantity of sentiment engrafted in my nature to permit me to comprehend how it is possible that children who live but a few months after their birth can have any earthly interest in any decision which our tribunals may make in regard to their *status*; and it is very certain that no determination that this court can make will in any manner affect their *status* in the world which they now inhabit." This we unhesitatingly declare to be sound law.

We find also reported, *in extenso* (much more so, in fact, than the case requires), the case of *Moulton v. Beecher* (pp. 193-246), which the curious may inspect at their leisure.

Mr. Abbott's notes, which are added to many of the cases, are carefully prepared, and of considerable value. He has also added, as an appendix, an excellent digest of all the points of law and practice contained in the different reports issued in New York during the time covered by this volume.

We cannot commend the mechanical work of this volume. It appears to have been cheaply constructed: the binding is poor, the printing carelessly done, and the paper is of a very inferior quality.

*Institutes of Common and Statute Law.* By JOHN B. MINOR, LL.D., Professor of Common and Statute Law in the University of Virginia. Vols. I. and II. Second Edition. Richmond: Printed for the author. Sold by M. McKennie & Son; Randolph & English; and West, Johnston, & Co. 1876-77.

THIS is a large and formidable work. The two volumes before us contain nearly seventeen hundred pages between them, and two volumes more are to come. It is an analysis of the whole common and statute law of Virginia (except the criminal law), arranged for the most part according to the system of Blackstone. Of the execution of the work in detail it becomes us to speak with diffidence; but the fact that it has in a very short time attained to a second edition shows a local popularity, which leads to the inference that, as a work of local law, it is well done and practically useful. As an elementary text-book, it is not calculated to serve students or practitioners in other States; partly by reason of the prominence given to the peculiar law of Virginia, and partly from what seems to us an inherent defect in plan, namely, that it is a big book made on a small model. The author has first made (following Hale and Blackstone) a most elaborate subdivision and synopsis of the various heads of the law, and then written a little treatise on each head, arranging the whole, by a device of printing which wastes a great deal of space, so as to show the relation of the different heads to each other, and to the general and comprehensive titles under which they are distributed. The extension of such a table or chart of the law through a large book loses



the main advantage of this system, which is to show all or many divisions of a subject, in a general way, at a single glance, and is calculated to confuse rather than assist the memory; while its complication makes it specially unsuitable to an elementary treatise. No doubt the work, as aided and supplemented by the oral exposition of the learned author, and by the black-board which he informs us he uses, may be a useful text-book for his own pupils; but others can only regret that he should have been at such pains to put so much good law into so awkward a shape.

We are sadly puzzled by the letters "W. C.," freely scattered at the ends of paragraphs throughout the book. Have they a mystic force, such as Lord Coke ascribes to the "&c." of Littleton? Are they part of the common law of Virginia? Or are they put there in obedience to any statutory enactment? Perhaps an explanation may be designed in the later volumes.

*Reports of Cases argued and determined in the Circuit Court of the United States for the Second Circuit.* By SAMUEL BLATCHFORD, Judge of the District Court of the United States for the Southern District of New York. Volume XIII. New York: Baker, Voorhis, & Co. 1877.

THIS volume contains the cases decided in the Second Circuit from June, 1875, to September, 1876, with some of an earlier date. Among these is a trial at *nisi prius*, in October, 1865, before Smalley, J., and the charge of the judge in the case of *Walker v. Crane*, p. 1, holding that a provost marshal may be held liable in a civil action for acts done by him in the discharge of the duties of his office.

*Boucicault v. Hart*, p. 47, decides that, to secure a copyright of a book or a dramatic composition under the United States Revised Statutes, it is necessary, not only to deposit with the librarian of Congress a printed copy of the title of the work, but to publish the book within a reasonable time after such deposit; and that allowing it to be represented on the stage is not a publication. This is the somewhat famous Shaughraun case.

*United States v. Polhamus*, p. 200, was an action against a broker to recover money paid to him in stock speculations, by Major Hodge, a paymaster in the army of the United States. The jury found for the defendant; and the court granted a new trial, on the ground that \$93,000 of the money was paid to the defendant in the official checks of Hodge upon an assistant treasurer of the United States, and the defendant was thereby put on his guard. It was also held to be no excuse that the defendant was so busy that he did not have time to look at the face of the checks when indorsing them.

*United States v. James*, p. 207, decides that an act of Congress establishing rates of postage need not originate in the House of Representatives, it not being a bill "for raising revenue" within the Constitution.

In *United States v. Loughery*, p. 267, the marshal was directed, under the U. S. Rev. Sta., § 804, to return jurymen from the by-standers. He recommended persons who were not about the court-house when the order was made. *Held*, that they became by-standers when they attended. The case also decides, that, if the accused escapes from custody during trial, the trial may proceed in his absence.

In *United States v. Winter*, p. 276, the defendant was indicted under the

name of D. K. Olney Winter. *Held*, that a motion to quash the indictment, on the ground that he was not described therein by any Christian name, must be overruled.

*United States v. Lawrence*, p. 295, is the famous case where the defendant was arrested in Ireland, upon a requisition made by the United States, in which he was charged with one crime, and contended that he could not be tried for another.

The *Sarah Harris*, p. 503, decides, that, if supplies are furnished to a vessel in a foreign port, on the order of a person in actual command and possession of her, as master, by a person who has no notice of any circumstances to raise a suspicion as to the authority of the master, a lien on the vessel is created, even as against a former owner, who contends that the vessel was sold in fraud of his rights, and that the purchaser at such sale placed the master in command.

The *Plymouth Rock*, p. 505, is another interesting case in regard to supplies.

There are also cases on pp. 218, 224, 231, 366, 395, in regard to the removal of causes from the State courts to the courts of the United States.

An Appendix contains the proceedings of the bar of New York on the death of Judge Woodruff; and also the case of Edward Lange, who was tried before Benedict, J., convicted, and sentenced to pay a fine and to be imprisoned for one year. He paid the fine, and was afterwards released on *habeas corpus*, by the Supreme Court of the United States, that court holding that the statute under which he was convicted did not authorize the imposition of both a fine and imprisonment. Two judges dissented. 18 Wall. 163. He then brought an action against Judge Benedict for false imprisonment. The Court of Appeals sustained the defendant's demurrer to the complaint.

*A Summary of Equity Pleading.* By C. C. LANGDELL, Dane Professor of Law in Harvard University. Cambridge: Charles W. Sever. 1877. pp. xxxi., 130. 8vo.

THIS is, in our opinion, one of the most remarkable books which has ever been written upon a legal subject by an American author. Mr. Langdell, with a characteristic liking to call great things by small names, speaks of it merely as a supplement to the collection of cases in Equity Pleading which is used as a text-book at the Cambridge Law School, and seems to barely contemplate the possibility that a few outsiders may want it. Yet we say, with confidence, that it could only have been written by a great lawyer, and that every page shows the hand of a master such as has rarely appeared in our literature. It begins with a historical introduction of about thirty pages, and then proceeds to consider the bill, answer, and other pleadings, concluding with chapters on Purchase for Value without Notice, Discovery and Relief, and Production of Documents. We do not say that the reader will not hesitate long over some of the author's conclusions, or promise that he will end by accepting them. Mr. Langdell is far too original a thinker to be sure of the easy acquiescence which is yielded to an ordinary writer. His advance is too irresistible to be stopped by the occasional obstacle of a decision. But, right or wrong, there is not an argument or conclusion in the book, even upon

familiar law, which does not throw a new and often brilliant light upon what it touches. It would wrong so pithy a book to attempt to give a summary of its points. If we were to select any part as of pre-eminent excellence, we should mention the introduction. The development of the ecclesiastical procedure as there unfolded, and the suggestion that that of the common law is founded upon the assumption that the parties to an action owe no obedience to the court, with the subsequent explanation of equitable doctrines as the result of a procedure in which litigants are compelled to obey, will take a student farther into the heart of the subject than many a weary hour of reading elsewhere; and, under the author's hand, even the function of parchment in the time of Lord Eldon becomes instructive.

*Reports of Cases decided in the Circuit and District Courts of the United States for the Ninth Circuit.* Reported by L. S. B. SAWYER, Counsellor-at-Law. Volume III. San Francisco: A. L. Bancroft & Company. 1877.

This volume contains decisions of the Circuit and District Courts of the United States rendered during the years 1874, 1875, and 1876, in the three districts which compose the ninth circuit. It contains also three charges to juries, which should have been omitted, as they deal largely with evidence, and are of little value as precedents. In a majority of the cases reported, the opinions were given by the district judges; but there are some judgments of Mr. Justice Field, and quite a number rendered by Judge Sawyer, the circuit judge.

The reporter's work is not distinguished either by great merits or by marked defects. He has adopted in many instances the common method of relying upon the opinion of the court for his statement of the facts in the case, and so printing only the opinion with the names of counsel, and sometimes a slight summary of their points and authorities. This system lightens the reporter's labor, and frequently secures an adequate presentation of the decision; but, as a labor-saving device, it is peculiarly liable to be abused, and affords no opportunity for making apparent the difference, which sometimes exists, between the case which the counsel argued and the case which the court decided. We are sorry to see it becoming so common. His head-notes, as a rule, are good.

Among the cases reported, we notice *In re Isaacs*, p. 35, where two traders agreed to unite their stocks in trade as the capital of a partnership, and to convert their separate debts into joint debts of the new firm. The firm having become bankrupt, the question was presented, whether a separate creditor, who had not acceded to the arrangement before bankruptcy, could prove against the joint estate. Judge Hoffman, following the authorities, decided that he could not; and his opinion contains a thorough examination of the decisions and the principles upon which they rest, which makes it a contribution to the law upon this subject.

*Pacific Mail Steamship Co. v. Ten Bales Gunny Bags*, p. 187, was a libel for salvage against the cargo of the Steamship *Colima*, which was disabled at sea by the breaking of her propeller, and was aided by the Steamship *Arizona*. The libellant owned both vessels, and, as owner of the *Arizona*, sought to recover salvage from the owners of the *Colima's* cargo. The claim was resisted, on the ground that the negligence of the libellant caused the accident,

and it could not recover as salvor compensation for a service which it was bound to render as carrier. The court, following the rule laid down by Sir R. Phillimore in the case of the *Miranda*, ruled that, under the bill of lading, the libellant was not liable, unless the accident was caused by its neglect; and, finding no neglect, awarded salvage.

The volume contains other interesting cases; but some of them have been noticed in our pages when they were decided, as *In re Ah-Fong*, p. 144, and for the rest we must refer our readers to the book itself.

*A Selection of Leading Cases in Equity, with Notes.* By FREDERICK THOMAS WHITE and OWEN DAVIES TUDOR, of the Middle Temple, Esqrs., Barristers-at-Law. With Annotations, containing references to American cases, by J. I. CLARK HARE and H. B. WALLACE. With additional Notes and References to American decisions, by J. I. CLARK HARE. Fourth American from the Fourth London Edition. In Two Volumes. Vol. I. Philadelphia: T. & J. W. Johnson & Co. 1876.

THIS edition of this familiar and valuable work is, notwithstanding the allegations of its title-page, contained in four volumes, and not in two only. Of a work of such position and influence, which has been for so long a time a necessary part of every lawyer's library, little can be said by the reviewer, except to chronicle its reappearance.

The fourth London edition contains in the notes about two hundred pages of new matter; and, in the edition before us, there are in addition some three hundred pages of new notes of American decisions.

We have no doubt of the ability and industry of the American annotator, and welcome his notes as a valuable contribution to the literature of equity jurisprudence; and we are pleased to notice a growing tendency to a general review of the decisions of the courts of last resort in all the States, and a less reliance on those of Pennsylvania alone.

During the last few years there has been a considerable increase in the cases requiring knowledge of equity principles and practice, and in the tendency to submit complicated questions of right to the determination of equity tribunals, and a corresponding demand for the best text-books and treatises on the subject; and we believe this work is to have an increased fame and usefulness.

*Maritime International Law.* By JOHN A. DAHLGREN, late Rear-Admiral U. S. Navy. Edited by CHARLES COWLEY, of the Massachusetts Bar, formerly Judge-Advocate on the staff of the Author. Boston: B. B. Russell, 55 Cornhill. 1877. pp. 147.

THE title of this little book is calculated to mislead. One expects a treatise, or at least an essay, on the very extensive subject indicated. But he finds, instead, notes on different branches of it, — apparently jotted down by the author in the course of his perusal of Hautefeuille, Ortolan, Wheaton, and a few other works of authority; rather, it would seem, as the materials of a small manual for naval officers, to be afterwards written, than as a finished production. As might be expected, it is full of repetition, and decidedly wanting in clearness of statement and instructive discussion.

Nor is the distinguished author perspicuous when he gives an anecdote, as he does occasionally, of his own professional experience. With one exception, it is difficult to ascertain what in particular he did, or why he did it. The exception is the case of the Peruvian Admiral Tucker, to whom Admiral Dahlgren, in 1867, being then in command of the United States South Pacific Squadron, refused to give the formal salute due to his rank, because Tucker had been an officer in the United States Navy, had gone over to the Confederate service, and had never been pardoned by our government. In this the narrator was clearly in error, and his action was disapproved by our Department of State.

It is difficult to conceive any good motive for the publication of these notes, except the affectionate admiration of friends. And, in this connection, we take pleasure (for the first time during the present writing) in saying, that a biographical memoir of the gallant admiral, contributed by his widow, gives value to the compend.

*Reports of Cases determined in the Supreme Court of the Territory of Utah, from the Organization of the Territory up to and including the June Term, 1876,* ALBERT HAGAN, Reporter. Vol. I. San Francisco: A. L. Bancroft & Company. 1877.

It is a rare thing to receive a volume of territorial reports, and a rarer to be called on to notice a work of such scope as this.

Since September, 1850, the date of the organization of Utah as a territory, her political character has undergone great changes; but it would seem that her judicial system must have been exceptional, to furnish only one thin, coarsely printed volume of reports as the product of the labor of twenty-six years. For comprehensiveness, in point of time, this volume is, as far as we know, unique; in point of substance, we have found little in it of general interest.

"The Jews have no dealings with the Samaritans;" and probably, during the life of their present ruler, the Mormons will continue to submit all questions of property rights to the final decision of their own lawgiver, rather than to the Gentile courts. It is largely, therefore, on those cases where Mormon usages and practices conflict with the general public law, and on criminal cases, that the United States territorial courts are called upon to pass.

If any reader should notice a certain solemn handling of trite subjects in the opinions of the court, we can only say, that this is one of the famous American tribunals in which, as we are informed, both judge and jury, the bar and the officers of the court, are accustomed to sit with their respective feet higher than their respectable heads, and to indulge in the unrestricted use of cigars, pipes, and tobacco. This custom is said to be admirably adapted to preserve order in court,—a view which we should be unwilling at present either to adopt or reject.

Of the ability and learning of the three judges who compose the Supreme Court of Utah, we have satisfactory evidence; and we believe that the rapid development of the southern part of this territory, consequent on the recent extensive construction of railroads, and the constantly increasing tide of emigration that has been created thereby, will soon afford them questions of more

importance and interest; and that the death of Brigham Young will open the gates for a flood of litigation concerning the tenure of lands and other rights of property, which has been temporarily and extra-judicially restrained by the inspired decrees of that prophet.

*A Treatise on the Law of Insurance:* with Supplement containing Notes of all Decisions in the Dominion, reported to March 1, 1877. By S. R. CLARKE, of Osgoode Hall, Barrister-at-Law. Toronto: R. Carswell. 1877.

WE have here a treatise on "The Law of Insurance as applicable to Canada," — a new and alarming subdivision of the law. As a digest, and for the Canadian lawyer, it may be found to be of some practical value. It does not rise to the dignity of a text-book; and we can imagine no service whatever to which any one in this country can put it, except possibly the officers of some insurance company whose business extends into the Dominion.

*Report of Cases determined in the Supreme Court of the State of Nevada during the year 1876.* Reported by CHAS. F. BICKNELL, Clerk of the Supreme Court, and Hon. THOMAS P. HAWLEY, Chief Justice. Vol. XI. San Francisco: A. L. Bancroft & Company. 1877.

THIS volume opens with the rules of the Board of Pardons, which we have examined with interest, and which indicate that the State of Nevada has established a system in reference to pardons, which might well be imitated by some of her older sisters. The Board of Pardons consists of the Governor, the three justices of the Supreme Court, and the Attorney-General, each member having a vote. It has four regular meetings in every year, at which applications for pardon are considered, though special meetings may be called by the Governor, when the exigencies of the case demand it. When a pardon has been refused, the case cannot be considered again for a year upon any ground specified in the original application, except by unanimous consent. The abuse of the pardoning power, which is a crying evil in States where it is vested in the Governor alone, or the Governor and a council, can hardly occur in Nevada. The presence of the judges makes it certain, that, in determining the questions presented to the Board, the rules which govern judicial investigation will be observed, and pardons will be granted according to some established principles, and not capriciously. The presence of the Attorney-General insures a proper representation of the prosecution; and it will no longer be possible to secure the pardon of a conspicuous rascal by handing to the Governor a petition, headed by some prominent political friend, and signed by numbers of good-natured people, who append their names without knowledge of the case, merely because some one has told one of their friends that the conviction was a mistake, or often simply because they are asked.

A large proportion of the cases reported in this volume are criminal cases, and several are contributions to the law of contempt of court. The reporting is unobjectionable, though the head-notes are open to the same criticism which we made in our notice of the last volume in this series. They are diffuse, and contain many general statements of law which we are accustomed to regard as axiomatic. For example, in *Odd Fellows Bank v. Quillen*, p. 109, we find the following note: "When the various sections of the statute are clear, plain, and

unambiguous, the legislature must be understood to mean just what it has explicitly expressed." The court surely cannot have found it necessary to decide this; and therefore it should not have been stated as a point decided.

In *State v. McClear*, p. 39, the court hold an act of the legislature unconstitutional, which provided that his "having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offence charged" should not be a ground for challenging a juror. The opinion of the court is long and elaborate, and contains a thorough examination of the authorities. In this case, out of thirty-six jurors, fourteen stated that then knew the facts in the case, and had formed and expressed an unqualified opinion that the defendant was guilty; four of these stated that they could not give him a fair and impartial trial, of whom one gave, as an additional reason for his bias, that he had had a personal difficulty with the defendant. The defendant was not permitted to challenge any of the fourteen on the ground of bias, and was entitled to only twelve peremptory challenges. We cannot see how the court could do otherwise than declare unconstitutional the law which allowed this.

We should be glad to mention the cases in which contempt of court was considered, — especially *Maxwell v. Rives*, p. 213, where, for refusing to answer ten questions, the court imposed upon the petitioner ten separate fines, amounting in all to \$1,250; but we have already exceeded our limits.

*A Treatise upon the United States Courts and their Practice*: explaining the Enactments by which they are controlled; their organization and powers; their peculiar jurisdiction, and the modes of pleading and procedure in them, with numerous practical forms. By BENJAMIN VAUGHAN ABBOTT. Third Edition. Rewritten and corrected conformably to the Revised Statutes and Recent Decisions. Vol. II. Original suits; review; forms. New York: Ward & Peloubet, successors to Diossy & Company. 1877.

We have already noticed the first volume of this edition (11 Am. Law Review, 353), and need add nothing to what we there said in regard to the general character of the work. The present volume deals with procedure and practice in the Federal courts, and nearly half its space is given to forms. Mr. Abbott's book is a useful manual; but we regret that a little more care was not taken to make this edition complete. For example, where so many pages are given to forms, we think the author might well have found room for the forms which are needed in carrying through compositions under the bankrupt act. So large a proportion of insolvent estates are settled in this way, that there is no part of the procedure in bankruptcy with which the practising lawyer needs to be more familiar.

The chapter on the "Removal of Causes" would have been more valuable, if fuller reference had been made to the numerous decisions of the State courts upon the various questions arising under the statutes authorizing removal. Three cases only are cited from State reports, and these all to one point. Again, we are somewhat surprised to find, in the chapter on Extradition, no reference to Judge Lowell's decision in *re Peter Kelley*, a leading case on an important point of practice, which was fully reported in our own pages (9 Am. Law Review, p. 167), if not elsewhere; though we can imagine that a

discussion of the questions raised by *Lawrence's* and *Winslow's* cases, neither of which are mentioned, was considered out of place in a work dealing merely with practice, and not with general principles.

We have looked in vain, also, for any statement of the practice where the supervisory power of the Circuit Court in cases of bankruptcy is involved. This is certainly a branch of the procedure in the Federal courts, which should not be wholly overlooked, and where any instruction which the author could have given would not have been thrown away.

Such omissions as these force us, unwillingly, to the conclusion, that Mr. Abbott has been content with making such changes in his work as the revision of the statutes rendered necessary; and with adding to his citations, without making all the additions to it which recent legislation should have suggested, or taking sufficient pains to make his citation exhaustive.

*The Law of Mines, Minerals, and Mining Water-Rights; a collection of select and leading cases on Mines, Minerals, and Mining Water-Rights, with Notes.*

By GEO. A. BLANCHARD and EDWARD P. WEEKS. San Francisco : Sumner Whitney & Co. 1877.

THE mining interests of the United States have now become so varied and extensive, that one would expect that a separate treatise upon the law relating to them would be a very valuable contribution to our legal literature. We find, however, if we can judge from the volume before us, that they offer no such opportunity as did the railroads, and that the material for such a work is very slight, — so slight, in fact, that almost every principle of law relating to them may be found in any work upon easements.

This book, however, will be invaluable to the members of the profession in several of the States (especially in California) as it contains all the various customs of the miners which have now been engrafted upon the law of those States, by statutes and decisions, and which, as they are usually directly opposed to the principles of the common law, cannot be found elsewhere.

Some of these customs are eminently practicable, and seem to have existed from the time of the first settlers. Upon page 113, there is a decision, taken from one of the California reports, which shows with what respect the judges as well as the miners regard them. It is there held, that any person who has discovered a vein, and desires to locate a mining claim for himself, may do so by putting up a notice with his own name and the names of those whom he may choose to associate with himself. Thus, this custom makes the discoverer the agent for those for whom he may choose to act, and makes his act their act, regardless of the fact whether they have any knowledge of it, or ever ratify it. One might suppose that having made himself agent to locate, he might make himself agent to do other acts in connection with the claim; but it was held that his agency ceased with the act of location. The judge, in giving his opinion, says: "However it may have been formerly, there is now no reason why judges should wander back to the time when Abraham dug his well, or explore the law of agency, or the statute of frauds, in order to solve a simple question affecting a mining claim; for a more convenient and equally *legal* solution may be found nearer home, in the customs and usages of the diggings embracing the claim."



The decision of the same court, page 598, decides, contrary to the Massachusetts doctrine, as set forth in *Shaw v. Spencer*, 100 Mass. 382, that the word "trustee," in a certificate of mining stock, does not mean any thing; and that the purchaser or pledgee of such certificate may look upon the trustee as the equitable as well as the legal owner. The reason given was, that it was common practice in California to conceal the name of the real owner, as the market value of the stock might be materially affected by his transactions; and, also, as the judge added, to escape assessments, — neither of which reasons, we are afraid, were presented to the attention of the court in Massachusetts. The general plan of this book is good; but the editors have made it too voluminous by needless repetition; there being one chapter containing a general résumé of all the customs of the West, which are afterwards repeated in the separate chapters upon "Location," "Mining Claims upon Public Lands," &c.

*History of a Suit in Equity, from its Commencement to its Final Termination.* By CHARLES BARTON, of Middle Temple. New Edition, revised and enlarged with Forms of Bills, Answers, Pleas, Demurrers, and Decrees. By JAMES P. HOLCOMBE. And an Appendix containing the Rules of Practice for the Courts of Equity of the United States, revised to date; the Statute Laws of the United States relating to Equity, and the Ordinances of Lord Bacon. Cincinnati: Robert Clarke & Co. 1877.

No ample criticism of this book is needed. Styled a *new* edition, it is simply a reprint of the first and only edition ever published, — that of 1847. Text and notes, even the preface, are reproduced word for word, with the sole additions of the recent statutes of the United States relating to equity, and the amendments to the equity rules of the Supreme Court, — all mere padding, useless in any text-book, and only to be consulted at the original source. The net result is an absurdity. The word "recent," which occurs frequently throughout the book, is to be read in the light of thirty years ago. Not the slightest allusion appears in text or notes to subsequent enactments and rules which have long since wrought marked changes in the law and practice of equity. The book as reprinted is not only valueless, but a false guide to the innocent reader, and should not be allowed a place in any library.

It is our impression that Mr. Holcombe, whose name is reprinted on the title-page, is no longer among the living, and we are surprised that a firm whose publications have been so uniformly valuable, should lend its name to what from any other source we should be inclined to call an imposition.

*United States Digest: A Digest of Decisions of the various Courts within the United States.* By BENJAMIN VAUGHAN ABBOTT. New Series. Volume VII. Annual Digest for 1876. Boston: Little, Brown, & Co. 1877.

OUR opinion of Mr. Abbott's work as a digester must be familiar to all our readers. We have been called upon to review his different works, as from time to time they have appeared, more frequently than those of any other author or compiler. His digests are valuable, thorough, and reliable. They are prepared with great industry and labor. They often furnish to the prac-

tising lawyer what it would be well-nigh impossible for him to obtain elsewhere; and, by their service in one case, render back to him more of value than all he has expended in the purchase of the whole series. This volume covers the reports of some eight courts of the United States, and of thirty-five of the States, contained in twelve volumes of United States Reports, and seventy-one volumes of State Reports; being in each instance the volumes of reports published since the last volume of this series. The volume contains, including the titles, cross-references, and table of cases, nine hundred and sixty-eight pages; and any criticism of its mechanical execution would be superfluous.

*The Rule in Shelley's Case, in Pennsylvania. Tabular Statements of the Decisions of the Supreme Court.* By JOSEPH P. GROSS, of the Philadelphia Bar (a Graduating Essay in the Law Department of the University of Pennsylvania, Class of '76). Printed by order of the Senate of Pennsylvania, Feb. 15, 1877. Harrisburg: B. F. Meyers, State Printer. 1877.

**A LIST OF LAW BOOKS PUBLISHED IN ENGLAND AND  
AMERICA SINCE APRIL, 1877.**

- Abbott, B. V. *A Treatise on the United States Courts and their Practice.* Third edition. 2 vols. 8vo, sheep, \$15.00. Ward & Peloubet, New York.
- Alabama Reports. Vol. 51. (Shepherd.) 8vo, sheep, \$3.50. Joel White, Montgomery.
- American Reports. Edited by Isaac Grant Thompson. Vol. 20. 8vo, sheep, \$6.00. John D. Parsons, Jr., Albany.
- Amos, Sheldon. *Comparative Survey of Laws in Force for the Prohibition, Regulation, and Licensing of Vice.* 8vo, cloth, 18s. Stevens & Sons, London.
- Angell, Joseph K. *A Treatise on the Law of Carriers of Goods and Passengers by Land and by Water.* Fifth edition, revised, corrected, and enlarged, by John Lathrop. 8vo, sheep, \$6.00. Little, Brown, & Co., Boston.
- Arkansas Reports. Vol. 30. (Moore.) 8vo, sheep, \$6.00. Adams & Blocher, Little Rock.
- Barton, Charles. *History of a Suit in Equity.* Revised and enlarged by James P. Holcombe. New edition. 8vo, sheep, \$2.50. Robert Clarke & Co., Cincinnati.
- Black Book of the Admiralty: Appendix. — Part IV. Edited by Sir Travers Twiss. Royal 8vo, half Roxburghe, 10s. London.
- Blanchard, G. A., and Weeks, E. P. *The Law of Mines, Minerals, and Mining Water-Rights.* A Collection of Select and Leading Cases. 8vo, sheep, \$7.50. Sumner Whitney & Co., San Francisco.
- Brice, S. *Treatise on the Doctrine of Ultra Vires.* Second edition. Royal 8vo, cloth, 42s. Stevens & Haynes, London.
- California Reports. Vol. 51. (Tuttle.) 8vo, sheep, \$4.50. Sumner Whitney & Co., and A. L. Bancroft & Co., San Francisco.
- Clarke, S. R. *A Treatise on Insurance, with Supplement containing Notes of all Decisions in the Dominion, reported to March 1, 1877.* 8vo, sheep, \$4.00. R. Carswell, Toronto.
- Cushing, L. S. *Manual of Parliamentary Practice.* Revised by Edmund L. Cushing. 16mo, cloth, 75 cents. Thompson, Brown, & Co., Boston.
- Davidson, Charles, and Dicey, H. T. S. *Concise Precedents in Conveyancing.* Tenth edition. 12mo, cloth, 16s. Maxwell, London.
- Davidson's Precedents and Forms in Conveyancing. Fourth edition. Vol. 2, Part 2. Royal 8vo, cloth, 32s. Maxwell, London.
- Dillon, John F. *Removal of Causes from State Courts to Federal Courts.* New and revised edition. 8vo, cloth, \$1.50. Central Law Journal, St. Louis.
- English Reports. Edited by Nathaniel C. Moak. Vol. 14. 8vo, sheep, \$6.00. William Gould & Son, Albany.
- Fry, Danby F. *The Lunacy Acts.* Second edition. Post 8vo, cloth, 21s. Knight, London.
- Goddard, John L. *Treatise on the Law of Easements.* Second edition. 8vo, cloth, 16s. Stevens & Sons, London.
- Greenwood's Manual of the Practice of Conveyancing. By Henry Nelson Capel. Fifth edition. 8vo, cloth, 16s. Stevens & Sons, London.
- Handy Book for Justices of the Peace. By a Devonshire Justice. Crown 8vo, cloth, 6s. Reeves & Turner, London.

- Harris, S. F. *Principles of the Criminal Law.* 8vo, cloth, 20s. Stevens & Haynes, London.
- Illinois Reports. Vols. 70 and 79. (Freeman.) Each, 8vo, sheep, \$5.00. Springfield.
- Indermaur, John. *An Epitome of Leading Conveyancing and Equity Cases.* Third edition. 8vo, cloth, 6s. Stevens & Haynes, London.
- Indiana Reports. Vol. 53. (Black.) 8vo, sheep, \$5.00. Indianapolis.
- Indiana Statutes. Revision of 1876, with Notes and References, by Edwin A. Davis. 2 vols. 8vo, sheep, \$12.00. Indianapolis.
- Kerr, W. W. *A Treatise on the Law and Practice as to Receivers appointed by the Court of Chancery, with Notes, &c.* By Geo. Tucker Bispham. 8vo, sheep, \$4.50. Kay & Brother, Philadelphia.
- Lawrence, P. H. *Compulsory Sale of Real Estate under the Powers of the Partition Act, 1868.* 8vo, cloth, 8s. Butterworths, London.
- Lloyd, Eyre. *The Law of Compensation.* Fourth edition. 8vo, cloth, 25s. Stevens & Haynes, London.
- Louisiana Annual Reports. Vol. 27. (Gayarre.) 8vo, sheep, \$10.00. New Orleans.
- Ludlow, H., and Jenkyns, H. *A Treatise on the Law of Trade-Marks and Trade Names.* 8vo, cloth, 10s. 6d. Maxwell, London.
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- Maryland Reports. Vol. 44. (Stockett.) 8vo, sheep, \$5.00. Baltimore.
- Massachusetts Reports. Vol. 120. (Lathrop.) 8vo, sheep, \$5.50. H. O. Houghton & Co., Cambridge.
- Minor, John B. *Institutes of Common and Statute Law.* Second edition, revised and corrected. Vols. 1 and 2. 8vo, sheep, \$15.00. Richmond.
- Missouri Reports. Vol. 68. (Post.) 8vo, sheep, \$4.50. W. J. Gilbert, St. Louis.
- Montana Reports. Vol. 2. (Blake & Hedges.) 8vo, sheep, \$7.50. Sumner Whitney & Co., San Francisco.
- Nebraska Reports. Vol. 5. (Brown.) 8vo, sheep, \$5.00. Mills & Co., Des Moines.
- Nevada Reports. Vol. 11. (Bicknell & Hawley.) 8vo, sheep, \$3.00. A. L. Bancroft & Co., San Francisco.
- New Hampshire Reports. Vol. 53. (Hall.) 8vo, sheep, \$4.25. Josiah B. Sanborn, Concord.
- New York Court of Appeals Reports. Vol. 64. (Sickels, Vol. 19.) 8vo, sheep, \$1.75. A. Bleecker Banks, Albany.
- New York Reports. Abbott's New Cases, selected chiefly from Decisions of the Courts of the State of New York. Vol. 1. 8vo, sheep, \$5.00. Ward & Peloubet, New York.
- New York Reports. Howard's Practice, Vol. 52. (Stover.) 8vo, sheep, \$4.50. William Gould & Son, Albany.
- New York Superior Court Reports. Vol. 41. (Jones & Spencer, Vol. 9.) 8vo, sheep, \$7.00. Ward & Peloubet, New York.
- New York Supreme Court Reports. Vol. 16. (Hun, Vol. 9.) 8vo, sheep, \$2.75. Banks & Brothers, New York.
- North Carolina Reports. Vols. 73, 74, and 75. (Hargrove.) Each, 8vo, sheep, \$7.00. Raleigh.
- North Carolina Reports. Vol. 76. (Kenan.) 8vo, sheep, \$4.50. Raleigh.
- Palmer, Francis Beaufort. *Conveyancing and other Forms and Precedents relating to Companies incorporated under the Companies' Acts, 1862 and 1867.* 8vo, cloth, 25s. Stevens & Sons, London.

- Paterson, J. Commentaries on the Liberty of the Subject and the Laws of England relating to the Security of the Person. 2 vols. Post 8vo, cloth, 82s. Macmillan & Co., London.
- Pennsylvania Reports. Vol. 80. (Smith.) 8vo, sheep, \$4.50. Kay & Brother, Philadelphia.
- Pollock, Fred. A Digest of the Law of Partnership. 8vo, cloth, 8s. 6d. Stevens & Sons, London.
- Roberts, T. A. The Principles of Equity as Administered in the Supreme Court of Judicature and other Courts of Equitable Jurisprudence. Third edition. 8vo, cloth, 18s. Butterworths, London.
- Rumsey, Almaric. A Chart of Hindu Family Inheritance. 8vo, cloth, 6s. 6d. W. H. Allen, London.
- Russell, Sir W. O. Treatise on Crimes and Misdemeanors. Ninth American, from the Fourth London, edition, by George Sharwood. 8 vols. 8vo, sheep, \$19.00. T. & J. W. Johnson & Co., Philadelphia.
- Sayles, L. C. The Law of Racing. Post 8vo, cloth, 2s. 6d. Shaw & Sons, London.
- Scintillæ Juris. By S. W. G. 18mo, cloth, 2s. Davis, London.
- Statutes, English. Revised edition. Vol. 12. 17 and 18 Vict. to 19 and 20 Vict., 1854 to 1856. Imperial 8vo, cloth, 28s. Eyre & Spottiswoode, London.
- Stephen, Sir James Fitzjames. A Digest of the Criminal Law (Crimes and Punishments). 8vo, cloth, 16s. Macmillan & Co., London.
- Stephen, Sir James Fitzjames. A Digest of the Law of Evidence. Third edition. Post 8vo, cloth, 6s. Macmillan & Co., London.
- Summerhays, W. F., and Toogood, T. Precedents of Bills of Cost. Demy 8vo, 8s. 6d. Stevens & Sons, London.
- United States Digest of Decisions of the Various Courts within the United States. By Benjamin Vaughan Abbott. New Series. Vol. 7. Annual Digest for 1876. Royal 8vo, sheep, \$6.00. Little, Brown, & Co., Boston.
- United States Reports, Second Circuit. Blatchford, Vol. 13. 8vo, sheep, \$7.50. Baker, Voorhis, & Co., New York.
- United States Reports, Ninth Circuit. Sawyer, Vol. 3. 8vo, sheep, \$7.50. A. L. Bancroft & Co., San Francisco.
- United States Supreme Court Reports. Vol. 98. Cases argued and adjudged in the Supreme Court of the United States. October Term, 1876. Reported by William T. Otto. Vol. 3. 8vo, sheep, \$5.00. Little, Brown, & Co., Boston.
- United States Statutes passed at the Second Session of the Forty-fourth Congress, 1876-77. Royal 8vo, paper, 75c. Washington.
- Utah Reports. Vol. 1. (Hagan.) 8vo, sheep, \$6.00. A. L. Bancroft & Co., San Francisco.
- Virginia Reports. Grattan. Vol. 27. 8vo, sheep, \$6.50. Richmond.
- Walker, J. Douglas. A Treatise on Banking Law. 8vo, cloth, 14s. Stevens & Sons, London.
- Waterman, Thomas W. United States Criminal Digest. A Digest of the Decisions in Criminal Cases, contained in the Reports of the Federal Courts and the Courts of the Several States. From the earliest period to the present time. Royal 8vo, sheep, \$8.00. Baker, Voorhis, & Co., New York.
- Wharton, Francis. The Law of Evidence in Civil Issues. 2 vols. 8vo, sheep, \$15. Kay & Brother, Philadelphia.
- Wood, H. G. A Treatise on the Law of Master and Servant; covering the Relation, Duties, and Liabilities of Employers and Employés. 8vo, sheep, \$7.50. John D. Parsons, Jr., Albany.

## SUMMARY OF EVENTS.

## UNITED STATES.

DEVISE TO UNITED STATES. — *United States, Plaintiffs in error v. Annie Fox et al.* — UNITED STATES SUPREME COURT. — Charles Fox, of the city of New York, who died in February, 1870, left a will, wherein he devised and bequeathed his whole property, after payment of debts, to the United States, to assist in discharging the national debt. On proper proceedings before the Surrogate of the city and county of New York, he held that the will was valid as a bequest of personalty, but inoperative as a devise of real estate, and that the latter descended to the heirs; and entered a decree accordingly. On appeal, this decree was sustained by the Court of Appeals of the State, and has now been affirmed by the Supreme Court of the United States. The court, in its opinion (FIELD, J.), says:—

“The sole question for our consideration is the validity of a devise to the United States of real estate situated in the State of New York. The question is to be determined by the laws of that State. It is not pretended that the United States may not acquire and hold real property in the State, whenever such property is needed for the use of the government in the execution of any of its powers; as, for instance, when needed for arsenals, fortifications, light-houses, custom-houses, court-houses, barracks, hospitals, or for any other of the many public purposes for which such property is used. And when the property cannot be acquired by voluntary arrangement with its owners, it may be taken against their will by the United States in the exercise of their power of eminent domain, upon making just compensation; a power which can be exercised in their own courts, and would always be resorted to if, through caprice of individuals or the hostility of the State legislature, or other cause, harassing conditions were attached to the acquisition of the required property in any other way. *Kohl v. The United States*, 1 Otto, 387.

“The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick v. Sturtivant*, 10 Wheaton, 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State.

"Statutes of wills, as is justly observed by the Court of Appeals, are enabling acts; and, prior to the statute of 32 Henry VIII., there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English statute of wills became a part of the law of New York, upon the adoption of her constitution, in 1777; and, with some modifications in its language, remains so at this day. Every person must, therefore, devise his lands in that State within the limitations of the statute, or he cannot devise them at all. His power is bounded by its conditions. That statute provides that a devise of lands may be made 'to any person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise.'

"The term 'person,' as here used, applies to natural persons, and also to artificial persons,—bodies politic deriving their existence and powers from legislation; but cannot be so extended as to include within its meaning the Federal Government. It would require an express definition to that effect to give it a sense thus extended. And the term 'corporation' in the statute applies only to such corporations as are created under the laws of the State. It was so held by the Court of Appeals in *White v. Howard*, 46 N. Y. 164, 165; and its construction of the statute is conclusive upon us. A devise to the United States of real property situated in that State is, therefore, void.

"The decree of the Court of Appeals is accordingly affirmed."

"A DAY'S WORK."—*United States v. Martin*.—The decision of the Supreme Court in this case, which came up on appeal from the Court of Claims, is a fresh and, as we think, a useful contribution to the much-discussed matter of establishing by law what shall constitute "a day's work." It will be remembered that, on June 25, 1868, Congress passed an act declaring "that eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may hereafter be employed, by or on behalf of the government of the United States" (Revised Statutes, § 3738). In construing this enactment, the court (Mr. Justice HUNT) says:—

"This was a direction by Congress to the officers and agents of the United States, establishing the principle to be observed in the labor of those engaged in its service. It prescribed the length of time which should amount to a day's work when no special agreement was made upon the subject. There are several things which the act does not regulate, which it may be worth while to notice.

"First, It does not establish the price to be paid for a day's work. Skilled labor necessarily commands a higher price than mere manual labor; and whether wages are high or low depends chiefly upon the inquiry, whether those having labor to bestow are more numerous than those who desire the service of the laborer. The English statute books are full of assizes of bread and ale, commencing as early as the reign of Henry II., and regulations of labor; and many such are to be found in the statutes of the several States. It is stated by Adam Smith, as the law in his day, that in Sheffield no master-cutter or weaver or hatter could have more than two apprentices at a time; and so lately as the 8 George III., and which remained unrepealed until 1825, an act was passed prohibiting, under severe penalties, all master tailors in London, or within five miles of it, from giving, or their workmen from accepting, more than two shillings and seven pence halfpenny a day, except in the case of general mourning. (Smith's *Wealth of Nations*, 125, 6, Oxford ed. of 1869.) A different theory is now almost universally adopted. Principals, so far as the law can give the

power, are entitled to employ as many workmen, and of whatever degree of skill and at whatever price, they think fit; and, except in some special cases (as of children or orphans), the hours of labor and the price to be paid are left to the determination of the parties interested. The statute of the United States does not interfere with this principle. It does not specify any sum which shall be paid for the labor of eight hours; nor that the price shall be more when the hours are greater, or less when the hours are fewer. It is silent as to every thing, except the direction to its officers, that eight hours shall constitute a day's work for a laborer.

"Second, The statute does not provide that the employer and laborer may not agree with each other as to what time shall constitute a day's work. There are some branches of labor, connected with furnaces, foundries, steamer, or gas-works, where the labor and the exposure of eight hours a day would soon exhaust the strength of a laborer, and render him permanently an invalid. The government officer is not prohibited from knowing these facts, nor from agreeing when it is proper that a less number of hours than eight shall be accepted as a day's work. Nor does the statute intend that, where out-of-door labor in the long days of summer may be offered for twelve hours at an uniform price, the officer may not so contract with a consenting laborer.

"We regard the statute chiefly as in the nature of a direction from a principal to his agent, that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based upon that theory. It is a matter between the principal and his agent, in which a third party has no interest. The proclamation of the President and the act of 1872 are in harmony with this view of the statute.

"We are of the opinion, therefore, that contracts fixing or giving a different length of time as the day's work are legal and binding upon the parties making them.

"In the case before us, the claimant continued his work, after understanding that eight hours would not be accepted as a day's labor, but that he must work twelve hours, as he had done before. He received his pay of \$2.50 a day for the work of twelve hours a day, as a calendar day's work during the period in question, without protest or objection. At that time, ordinary laborers under the same government received but \$1.75 per day at the same place; and those engaged in the same department with the claimant in a private establishment, at the same place, received but \$2 for a day's work of twelve hours; and the finding adds, 'They had more work to do than the claimant had while similarly employed.' The claimant's contract was a voluntary and a reasonable one, by which he must now be bound.

"In 1873, the claimant applied for the same arrears of pay as are here in question, and received from the auditor an award of \$205.63. That amount was paid to the claimant, and he receipted in writing in full for the account. This has often been held in this court to be a bar to any further claim. *United States v. Justice*, 14 Wall. 535; *United States v. Child*, 12 id. 282.

"These principles require a reversal of the judgment of the Court of Claims. The case is remanded to the Court of Claims, with directions that the petition of the claimant be dismissed."

REVISED STATUTES. — It is said that ex-Secretary Boutwell has completed the annotation of the Constitution in the progress of his work of bringing out a new edition of the Revised Statutes. It is thought the whole work may be finished by the close of the present year.



## COLORADO.

COURT SITTING AS JURY. — One of the county courts has found a somewhat novel way out of the difficulty of deciding upon a tangled mass of facts. A correspondent of the *Central Law Journal*, writing to that paper, says:—

"The county courts of Colorado are *nisi prius* courts, having concurrent jurisdiction with the district courts, when the matter in controversy does not exceed \$2,000. In an action recently brought in the county court of this county, tried before the court without a jury, the court rendered the following decision: 'In the case of — v. —, this court, sitting as a jury, has heard the evidence, and the court as court has instructed the court, sitting as a jury, as to the law in the case. After due deliberation over the evidence and the instructions, the court, sitting as a jury, is obliged to announce that the jury cannot agree; and a new trial, before another jury, is consequently ordered.' "

## FLORIDA.

It is provided by the new jury law that a juror who does not have a knowledge of reading, writing, and arithmetic, may be challenged in any case in which such knowledge may be necessary to enable the jury to understand the evidence.

## MASSACHUSETTS.

CORONERS. — The much-discussed and troublesome question of coroners received a satisfactory solution, so far as Massachusetts is concerned, at the last session of the legislature (Acts of 1877, ch. 200). This new act embodies substantially the changes pointed out in a paper in our last number (Notes on Coroners) as desirable; viz:—

- "1. The abolition of the coroner's jury.
- "2. The abolition of the office of coroner, and the division of his functions between —
  - "a Medical officers to make the physical examination, and testify as to its results.
  - "b Judicial officers to hear the testimony and apply the law.
- "3. The appointment of permanent medical officers . . . for the former duty.
- "4. The transfer of the latter duty to the courts of first instance."

MURDER, SUICIDE. — A novel and exceedingly curious question of law arose in *Commonwealth v. Lucy Ann Mink*. The defendant was indicted for the murder of one Ricker. At the trial it appeared that Ricker came to his death from a pistol-shot wound; that, at the time the wound was received (a little after ten o'clock in the evening), he and the defendant were together in a room, the door of which was closed, so that it could not be opened from the outside without a key; that they had been sitting there together, without a light, for about two hours before the shot was fired; that, just before or just after the sound of the shot was heard (the evidence was conflicting on this point), a noise as of a scuffle was heard in the room, and voices, or at least a voice, was heard inside the room; that then a man was heard to cry out, "Burst open the door; I am shot," or something to that effect. A number of people gathered about

the door. The door was burst open, and the man was found with his arms thrown around the woman as if trying to hold her; and she had a pistol in her hand, which was shortly after taken from her by force.

The defendant testified in her own behalf. She said, in substance, that she had been engaged to be married to Ricker; that he had shown a disposition to desert her; that she had sought this interview in the hope of bringing him back to her; and that, failing in this effort, she had attempted to commit suicide; and that, in interfering and attempting to stop her, Ricker had, by accident, received the wound which caused his death.

In charging the jury, the court, referring to the view of the matter presented by the defendant's testimony, said:—

"But there is another aspect of the case, which on consultation the court have felt it their duty to present to you, although it has not been made prominent in the argument that has been addressed to you on either side. Suppose the shooting were then a matter of accident. If it were a mere accident, strictly and purely and literally an accident, such as might happen from the dropping of a pistol on the floor, and death ensued, it would not be a criminal act on the part of the defendant. It would be a matter, you might say, in which she was guilty of carelessness; but she would not be guilty of either murder or manslaughter, and she would not be guilty of any crime which could be animadverted upon in the criminal courts. But there is a kind of accident which might happen, which would still leave her to some extent responsible as a criminal. I understand her, in her testimony, to say that she put the pistol to her head, or, at any rate, that she took it out of her trunk, with the intention of committing suicide. Well, if that were true, gentlemen, what would be the position of the case? and how would she stand in this court? In all indictments for murder there are three verdicts, either one of which it would be competent for the jury to render, according to the evidence. That is to say, the jury might find the defendant guilty of murder in the first degree; they might find her guilty of murder in the second degree, and not in the first; they might find her guilty of manslaughter; or they might find her guilty of not any form of crime. Well, now, supposing that you believe her story, and that she did put the pistol to her head with the intention of committing suicide, she was about to do a criminal and unlawful act, and that which she had no right to do. It is true, undoubtedly, that suicide cannot be punished by any proceedings of the courts, for the reason that the party who killed himself has placed himself beyond the reach of justice, and nothing can be done. But the law, nevertheless, recognizes suicide as a criminal act, and the attempt at suicide as also criminal. It would be the duty of any by-stander who saw such an attempt about to be made, as a matter of mere humanity, to interfere and try to prevent it. And the rule is, that, if a homicide is produced by the doing of an unlawful act, although the killing was the last thing the party about to do it had in his mind, it would be an unlawful killing, and the party would incur the responsibility which attaches to the crime of manslaughter. Then, gentlemen, you are to inquire, among other things,—and if you reach that part of the case,—Did this woman attempt to commit suicide in his presence? And if she did, I shall have to instruct you that he would have a right to interfere and try to prevent it by force. He would have a perfect right, and I think I might go further and say that it would be his duty, to take the pistol away from her, if he possibly could, and to use force for that purpose. If, then, in the course of the struggle on his part, to get possession of the pistol, to prevent the person from committing suicide,—if in the course of such struggle the pistol went off accidentally, and he lost his life in that way,—it would

be a case of manslaughter; and it would not be one of those accidents which would excuse the defendant from being held criminally accountable."

At a later part of the charge, returning to the subject, the court said:—

"Did she get herself into such a condition of despondency and disappointment that she was trying to commit suicide, and was about to do so? If that was her condition,—if she was making that attempt, and he interfered to prevent it, and got injured by an accidental discharge of the pistol, as I told you it would be manslaughter."

And again:—

"If, on the contrary, you find it was an accident occurring in such case as I have described, in an attempted suicide; if you think that it is an accidental killing, but not justified by the circumstances under which she stood at the time,—not accidental, as being a pure accident; but criminal, as being the result of a wrongful act on her part,—it would be your duty to find her guilty of manslaughter, and not of murder in either degree."

The jury apparently adopted the defendant's account of the occurrence as the true one, as they returned a verdict of manslaughter. The defendant, however, has filed exceptions to the rulings of the court, that the accidental shooting of Ricker while she was attempting to commit suicide rendered her guilty of manslaughter; and the case goes to the full court on that point.

It is worth noting, in this connection, that in *Commonwealth v. Dennis* (105 Mass. 162), it was held that an attempt to commit suicide was not indictable in Massachusetts. In the last-named case, the court said that the legislature, having dealt as a whole with the matter of attempts to commit crime (Gen. Stat., ch. 168, § 8), the common law on the subject was repealed by implication; and that, it being provided by that act that in no case should the punishment for an attempt exceed one-half the penalty affixed to the commission of the crime, no punishment was provided for an attempt to commit suicide, as the act itself was not punishable by the law of the State; and therefore that the person making such an attempt was not indictable.

**THE SUNDAY LAWS.**—The case of *Smith v. Boston & Maine Railroad*, 120 Mass. 490, in which a majority of the Supreme Court held that a man unlawfully travelling along the street on the Lord's day cannot maintain an action against a railroad company for injuries sustained by him at a railroad crossing, through the negligence of the company's servants, has certainly pushed the doctrine that a man violating the Sunday law cannot recover for injuries sustained while so doing, further than any case in our knowledge, except, perhaps, the case of *Gregg v. Wyman*, 4 Cush. 322, expressly overruled in *Hall v. Corcoran*, 107 Mass. 251; and it does not seem to us reconcilable with this last case, or with the previous cases of *Welch v. Wesson*, 6 Gray, 505, *Cox v. Cook*, 14 Allen, 165, and *Steele v. Burkhardt*, 104 Mass. 59.

Smith was passing along the street on secular business: he came to the railroad crossing, and was there injured by the negligence of the railroad company. His case would seem to fall exactly within the language of Chief Justice Chapman in *Steele v. Burkhardt*, quoted with approval by Mr. Justice

Gray in *Hall v. Corcoran*, that, "while no person can maintain an action to which he must trace his title through his own breach of the law, yet the fact that he is breaking the law does not leave him remediless for injuries, wilfully or carelessly done to him, and to which his own conduct has not contributed." And the facts of the two cases are almost exactly similar. In *Steele v. Burkhardt*, a man illegally left his horse and wagon in the street, in a manner forbidden by a municipal ordinance; held, that he might maintain an action against a person negligently driving against it. In *Smith v. Boston & Maine Railroad*, Smith was illegally passing along the street; held, that he could not maintain an action against a railroad company for negligently injuring him at a crossing. We must confess ourselves to be at a loss to see the distinction between the cases.

*Welch v. Wesson*, the leading authority relied upon in *Steele v. Burkhardt*, is, if possible, a still stronger case. The plaintiff and defendant were illegally engaged in trotting their horses against each other, and, while so doing, the defendant wilfully ran the plaintiff down; held, that the plaintiff could maintain an action against the defendant for the injury thus suffered. This case has never been questioned.

In *Hall v. Corcoran*, in which all the cases are very ably reviewed by Mr. Justice Gray, and *Gregg v. Wyman* was expressly and unanimously overruled, it was decided that a person who hires a horse of its owner to drive to a particular place, and drives it to another place, is liable in tort for the conversion of the horse, although the contract was made on the Lord's day, for pleasure only, as both parties knew, and therefore illegal and void. The learned judge said, that "the defendants' liability for the injury done by them to the plaintiff's property is not affected by the question, whether the contract between the parties was valid or void in law, or whether there was or was not any such contract in fact. The contract need not, therefore, be shown by the plaintiff; and, if proved by the defendants, by cross-examination of the plaintiff's witnesses or otherwise, it has nothing to do with the plaintiff's cause of action against the defendants."

We think this principle should have been applied in *Smith v. Boston & Maine Railroad*. The defendants negligently injured the plaintiff, while he was passing along the public streets of the city. Why he was in the street, or the fact that he was there for an unlawful purpose, had no more to do with the plaintiff's right of action for injuries received by the defendant's negligence than the fact that the plaintiff was racing had to do with his right of action for wilful injuries inflicted by the defendant in *Welch v. Wesson*, or the fact that the plaintiff had unlawfully let his horse to the defendants had to do with his right of action for its subsequent conversion in *Hall v. Corcoran*. The action was solely for tort, and not founded on any contract. It differs from an action, under similar circumstances, against the city, for injury suffered by the plaintiff from a defect in the street; for the liability of the city therefor rests solely on statute, and only to those who are using the street for lawful purposes. It differs from an action, under similar circumstances, by a passenger against a common carrier (assuming *Stanton v. Metropolitan Railway*, 14 Gray, 485, to have been correctly decided); because that rests upon the illegal contract of carriage, which was thought to be the basis of the plaintiff's suit.

But see, *contra*, *Philadelphia, Wilmington, & Baltimore Railroad v. Philadelphia & Havre de Grace Towboat Company*, 23 How. 218; *Mohney v. Cook*, 26 Penn. St. 342; *Carroll v. Staten Island Railroad*, 58 N. Y. 126; and the Massachusetts Statute of 1877, c. 282, changing the law from what it was decided to be in *Stanton v. Metropolitan Railway*.

It ought to be said that, in *Smith v. Boston and Maine Railroad*, the court places the decision solely on the plaintiff's illegal travelling, and takes no notice of the point which we are considering; and none of the cases we have relied upon is cited. But it can hardly be that in a case in which the court was not unanimous, and in which its decision was so inequitable, the other grounds, upon which we think the action was maintainable, were overlooked, and that *Welch v. Wesson* and *Hall v. Corcoran* escaped the attention of the learned judges. Be this as it may, we cannot but think the decision wrong as well as harsh, and one not likely to be followed.

A. L. SOULE, Esq., of Springfield, has been appointed an associate justice of the Supreme Judicial Court, to fill the vacancy occasioned by the resignation of Judge Devens on his appointment to the office of Attorney-General of the United States.

#### MINNESOTA.

**MARRIAGE.** — *State of Minnesota v. Leo Miller and Mattie Strickland*. The defendants in this case, who seem to have set somewhat wide bounds to the liberty of conscience which they opposed the Constitution guaranteed them, entered into the following contract: —

"Union, Civil and Conjugal: The undersigned, this second day of November, A.D. 1875, enter into a business partnership, under the name of Miller & Strickland, on the following conditions, to wit: That all earnings and profits arising from our individual and joint labors, whether in departments of literature, art, science, mechanics, agriculture, or trade, shall be shared and held equally.

"Believing that the divine principle of love, drawing together two kindred souls, is the only binding law in the conjugal union of the sexes, and the only law making right such intimate relations, we are also happy to confess to each other, to God, and His angels, and to all the world, the existence of a mutual affection known by that name; and we deliberately join heart and hand in this most sacred of all unions, hoping and praying that the tie that binds us may last through life and survive the grave.

"Should this union be blessed by offspring, we jointly and severally pledge ourselves, our assigns and administrators, to foster and support them during the dependent years of infancy and youth; supplying their physical wants, and rearing them in principles of virtue and knowledge, to the best of our ability and judgment.

"This simple form of conjugal union we are constrained to adopt from the deepest conscientious convictions of right and duty; and we sincerely regret that condition of society, which, if we would be true to ourselves, makes it necessary for us to oppose the opinions of a majority of our fellow-creatures; disregarding the laws and customs which they assume to make for the control of an affection between the sexes, which we believe is, and of divine right ought to be, free.

"Chicago, Ill., Nov. 2, 1875.

"(Signed)

LEO MILLER,

"(Signed)

MATTIE STRICKLAND."

The district attorney, however, took a different view of the constitutional rights of the defendants, and promptly indicted them for lascivious cohabitation. The case was tried on an agreed statement of facts, which set out the above agreement, admitted that the parties lived together in pursuance of it, and that no marriage ceremony between them had ever been performed; and submitted their right so to live together to the court, subject to the right of appeal. The court below found the defendants guilty, and they appealed. The Supreme Court has affirmed the judgment, saying:—

“The question sought to be presented and argued by appellant is not properly before us for consideration. The return to the appeal contains no exceptions taken to ‘any opinion, direction, or judgment’ of the court below, and settled, allowed, and made a part of the judgment roll, as prescribed by sec. 7, chap. 117, of the General Statutes.

“Hence, the only question which can be considered upon the record before us is as to the sufficiency of the indictment to support the judgment.

“As appellant makes no question of this character, and none is apparent to the court, the judgment is affirmed.”

Probably, in their next articles of co-partnership, the defendants will include a “department” of law, as well as of literature, art, and science.

## NEW YORK.

**EMMA MINE.—FRAUDULENT REPRESENTATIONS.—FEES OF JURORS.** The case of the *Emma Mining Company v. Trenor W. Park et als.*, brought to recover damages resulting from alleged fraudulent representations as to the value of the mine sold to the plaintiffs, has resulted in a verdict for the defendants. The trial began Dec. 13, 1876, and continued for the extraordinary time of seventy odd working days. The case has attracted much attention, not only on account of the unusual length of time spent in trying it, and of the importance of the questions of law it involved, but by reason of a sort of international importance attaching to it, owing to the unhappy connection with the matter of our late minister to England. The following summary account of the trial, which we take from the *Albany Law Journal*, will be found of interest:—

“The case was this: In November, 1871, the Emma Mine was owned by the Emma Silver Mining Company, of New York. All the shareholders of that company had united in an agreement, whereby the stock of the company was transferred to Messrs. Park, Baxter, and two others, to sell the entire stock of the corporation, or any part of it, and to distribute the proceeds among the stockholders.

“Mr. Park proceeded to London, and there made a contract with Albert Grant & Co., by which the latter were to organize a joint-stock company for the purchase of the mine, at the price of £1,000,000 sterling. By this agreement, Grant & Co. were to receive £100,000 for their services and expenses in ‘floating’ the enterprise, besides commissions on sales of stock, from which they eventually received £100,000 more.

“General Schenck, American Minister to England, was induced to consent to become a director in the proposed company. Largely through the influence of his name, several English gentlemen of official and social prominence also consented to

become directors, and the Emma Silver Mining Company (limited), of London, was organized. Messrs. Park and Baxter were among the directors.

"The directors issued a prospectus setting forth all the material facts relative to the character, past history, and value of the mine. All the stock was immediately subscribed for. The prospectus announced that monthly dividends of one and a half per cent would be paid, commencing on the first day of the month next ensuing. It contained extracts from the report by Prof. Silliman, of Yale College, and from a letter of Prof. W. T. Blake, describing the mine in glowing terms.

"Beside the mine, the new company was to acquire upon the purchase 2,800 tons of ore, in transit from the mine to England, for smelting, of the estimated value of £28 per ton, and £46,800 proceeds of ore recently raised from the mine and sold. The prospectus stated that this ore had all been raised within four months, and that the net yield of the mine within that period had been £231,000. For the mine and property the company paid £1,000,000, — half in paid-up shares, half in cash.

"The company took possession, and continued to operate the mine until the ore gave out. It paid dividends of one and one-half per cent., monthly, for thirteen months, and then dividends ceased.

"It appeared in evidence that Grant & Co. had paid Col. Sturt, an army officer, £10,000, for his influence in inducing some of the members of Parliament to become directors; that qualifying shares of the value of £500 had been presented to each of the directors; and that Jay Cooke, McCulloch, & Co., whose names were referred to as the bankers of the company, received £25,000. Whether Park was a party to these payments was a point in dispute upon the testimony.

"After Mr. Park's arrival in London, and before he arranged with Grant & Co. to bring out the company, he had entered into negotiations with Coats & Hankey, stockbrokers, to bring it out. They required a report on the mine from some one to be selected by themselves, and they selected Prof. Silliman. He was to make an examination, and report to them, but at the expense of the vendors. He did make the report, and was paid therefor \$25,000 by the vendors.

"After the mine had given out, the corporation brought suit against Park and Baxter for fraud in the sale, alleging that it was a fraud from beginning to end. It was also alleged that it was effected by fraudulent suppression and misrepresentation of material facts. The misrepresentations relied on were the statements as to the past yield, character, and condition of the mine as represented in the prospectus and in Prof. Silliman's report.

"A vast mass of testimony was introduced upon the trial. The reading of depositions taken in Utah and in London occupied over a month. A large number of experts were examined upon geological and mineralogical facts; mining engineers, superintendents, and assayers were examined, and testimony was given, relative to the local mining laws and customs of Utah, and as to the commercial usages in England, particularly those of the Stock Exchange of London.

"The case presented a great many questions of law, some arising upon English statutes and decisions in construction in regard to joint-stock companies; others, upon mining laws and territorial decisions in regard to effect of location and scope of patents. But those of most general interest to the profession involved the right of the corporation to maintain the action; the evidence by which it was to be made out; and the effect upon the transaction of the relations of the vendors to the vendee, the former being directors of the latter.

"The plaintiff was organized for the express purpose of purchasing the Emma Mine, and the defendants were made directors to carry out that purpose. It was claimed that the corporation could not maintain the action; that while stockholders could recover upon proper proof, no right of action arose in favor of the plaintiff;

that the prospectus issued by the directors was the act of the corporation, and could not be the vehicle of fraudulent representations to the corporation ; that, as the defendants were directors, the corporation was chargeable with notice of all the facts of which they had notice, and in regard to which they took official action.

" The court held, that, if the corporation was induced to part with the corporate funds by fraud or deceit, it could maintain an action for its damages ; that this could only be shown by proof that its directors had been induced by deceit to purchase ; that this was not shown by proof that a prospectus containing false representations had been issued ; that although every stockholder might have subscribed on the faith of the prospectus, and thus furnished the fund for the purchase, proof to such effect was not competent ; that the sole question was whether the defendants had deceived their co-directors, and induced the corporation to make the purchase and part with its money ; that, in connection with evidence of the participation of the defendants in the preparation of the prospectus, the prospectus was admissible as evidence of representations made by or sanctioned by the defendants to their co-directors ; and, as it was approved by all the directors, was evidence that the co-directors relied upon the truth of its statements.

" The court also held, that as the defendants occupied fiduciary relations toward the corporation, they were bound to the duty of full disclosure of all material facts, and were liable for fraud if they withheld information as to material facts, intending thereby to mislead their co-directors ; that they could not shield themselves by silence ; and, if their co-directors were induced to purchase the property upon the assumption of the truth of material facts which defendants knew did not exist, the defendants were liable.

" The court held, that if the defendants misled their co-directors by fraudulent suppression or representation, the cause of action inured to the corporation, and it could recover damages for the fraud ; that it could not recover upon proof that the shareholders were misled, who subscribed for the stock, and thus furnished the funds for the purchase ; and that the prospectus was only important in so far as it evidenced representations made by the defendants to their co-directors.

" The court also held that fraudulent practices in procuring influential persons to become directors, or in commending the enterprise to the favor of shareholders, were not and could not be a substantive cause of action, but might be considered by the jury upon the question of *scienter*.

" There was a large amount of evidence tending to show that the defendants fully believed the truth of the representations in the prospectus, and in Prof. Silliman's report as to the history, character, and value of the property.

" The jury undoubtedly concluded that, although illegitimate and dishonorable practices were used to organize the company and float the enterprise, the defendants were not guilty of any fraudulent intent ; in short, that they wanted the co-operation of men of prominence to give credit to the speculation, but did not expect them to lend themselves to any fraud, and fully believed that the property was all it was represented.

" By reason of the great length of the trial, the counsel for both sides proposed that \$5,000 additional compensation be given to the jury : but the court held, that it could not sanction the proposition ; that the law which exacts jury service of the citizen prescribes the compensation, and court had no authority to diminish or increase it because of the circumstances of a particular case ; that it is to be assumed the law was passed upon full deliberation, and to increase the compensation it awards would be an imputation upon the justice and wisdom of the law, and, therefore, an impropriety ; that, under such circumstances, the court should not sanction in the parties what it would not do of its own motion.



"Further, that the action proposed would introduce a dangerous precedent. Similar action might be suggested by it in future cases, and it might happen that suggestions would proceed from parties or from jurors for extra compensation in cases far less meritorious than this; that its tendency would be to tempt parties to bid for the favor of juries, by proposing extra compensation, knowing the adverse party might be unable or unwilling to assent.

"In short, that it would open the door of the jury box to impure and demoralizing influences, and for that reason should be discountenanced."

### PENNSYLVANIA.

**CONTROL OF BODY AFTER DEATH.** — A dispute of very rare occurrence arose in *Lowry v. Plitt*, lately determined by the Court of Common Pleas in Philadelphia. The facts were these: Mrs. Henrietta Lowry died in January, 1866, at Philadelphia, in a house bought and furnished for her by one of her sons, Lowry D. Lowry, then living in Peru. At the time of her death, neither Mrs. Lowry nor either of her children owned any place of burial, and she was buried in a lot in Laurel Hill Cemetery, belonging to her sister, Sophia W. Plitt. Mrs. Lowry's father, mother, and four sisters had been buried in the same lot, and she was buried there without any objection on the part of those of her children who were present. Afterwards, Lowry D. Lowry returned to Philadelphia, and died, leaving a will, in which he directed that the sum of \$5,000 should be spent in building a vault in Laurel Hill Cemetery, in which he wished that the remains of his mother, and of certain other relatives, should be placed. On completion of the vault, the executors attempted to enter Mrs. Plitt's lot, for the purpose of removing Mrs. Lowry's remains; but were prevented by Mrs. Plitt, and Mrs. Edwards, a daughter of Mrs. Lowry. The executors, together with three of the sons of Mrs. Lowry, thereupon filed their bill against Mrs. Plitt, Mrs. Edwards, and the Laurel Hill Cemetery, praying an injunction forbidding the respondents from hindering the removal. The respondents set up in their answer that Mrs. Lowry, "before her death, had repeatedly expressed a desire to be buried in that lot, and on her death-bed gave express directions to that effect;" and that such removal would do great violence to the feelings of the respondents.

Before argument one of the sons, party plaintiff, died, and another withdrew from the cause and opposed the removal.

The case was heard on bill and answer, and the bill ordered to be dismissed, the court (FINLETTER, J.) saying: —

"The controversy is about the right to disinter and remove, after appropriate obsequies, which were considered by all interested as final.

"In *Wynkoop v. Wynkoop*, 8 Wright, 298, it is clearly and broadly decided that, after interment, all control over the remains is with the next of kin. The reasoning which transfers this right from the widow is not satisfactory; because it does not seem to be based upon principle or reason, and is repugnant to the best feelings of our nature.

"Such a right must necessarily be in the next of living kin. It is only the living who can give the protection, or be burdened with the duty of protection, from which the right springs. It is only the living whose feelings can be outraged by any unlawful disturbance of the dead. From this it follows that it is a right which cannot be

transmitted or transferred. It is, moreover, one in which all of the next of kin have an equal interest. The plaintiff, therefore, derives no authority over the remains of his mother from his brother's will; and in himself he has no better claim than his sister or brother. He is, then, without that clear exclusive title which alone is enforced by injunction.

"When it is considered that the removal of the remains of Mrs. Lowry involves an invasion of the rights of Mrs. Plitt, it is not clear that, even if all the next of kin had joined in these proceedings, we could have granted the relief prayed for. The law regards with favor 'the repose of the dead.' When they are inurned in the places selected by them, it must be something more than sentiment or abstract right which will induce us to enforce the claim of the next of kin, by the invasion of the burial-place of another. In such a case, it may well be questioned whether the right of the next of kin exists at all.

"This doctrine is more than foreshadowed by Chief Justice Read, in *Wynkoop v. Wynkoop*, when he says: 'Besides, the fact that her son is deposited in her burial-place, in consecrated ground, and that he was buried with the ceremonies of the church and with the honors of war, is sufficient to justify us in refusing permission to a removal under the circumstances.'

"Mrs. Lowry was buried where she desired to be, with the acquiescence of all her children. Those of them who survive are divided upon the question of removal. She is with her father, mother, sisters, and her first-born. Upon the granite which marks their resting-place, her name is graven with theirs; and beneath it their ashes have commingled. It is fitting they should remain undisturbed."

## TENNESSEE.

**CONSTITUTIONAL LAW.** — An interesting question touching the constitutional restrictions on the power of the legislature arose in the case of *Perkins v. Scales*, lately decided by the Supreme Court. The case involved the question, whether a certain act of the general assembly was constitutional, and the bench of six judges was equally divided in opinion. It appeared, however, that while the case was pending, the general assembly had passed an act, providing that —

"In all cases now pending in the Supreme Court, or hereafter brought thereto, in which the judges shall be equally divided, the judgment shall be determined as follows: 'If the case depend upon the constitutionality of any act of the general assembly, then such judgment or decree shall be in favor of the validity of such act. In all other cases, the judgment or decree of the court below shall be affirmed.'"

On the question whether the legislature had power under the Constitution to pass the last-named act, the court (FREEMAN, J.) says: —

"By the Constitution, the powers of government are distributed among the departments, — the legislative, the executive, and judicial, — and 'no person or persons belonging to any of these departments shall exercise any of the power properly belonging to either of these others, except in cases herein permitted or directed. Art. 2, sects. 1 and 2. By the schedule to the Constitution of 1870, it was provided that six judges should compose this court, until there should be a vacancy occurring after the first of January, 1878. Section 2.

"The court thus constituted was the supreme judicial tribunal of this department of the government. Its function was to decide all cases on the law and facts that might be brought before it in accordance with the jurisdiction conferred by the Con-

stitution. In accordance with the genius of such an organization, a majority of the court would be required to render a decision; for, if this was not the case, then a minority might do it, — a conclusion to which no one, we take it, would assent. In any court, however, whatever decree the court shall give must be the result of its own judgment, in the performance of the functions assigned it by the Constitution. No other department of government has the right to indicate or dictate what that judgment shall be. This would be to usurp the judicial function confided exclusively by the Constitution to the judicial department.

“Whether the legislature might or might not have enacted a rule for the government of the court on this subject in the future may be possibly a different question, but that it could prescribe what the court should do in cases then before the court we think is beyond all question to overstep the line limiting their power under the Constitution. However, we may say, it would seem difficult to distinguish in principle between the two cases; that is, of an enactment operating on cases then pending, and on future cases. In either case, it is not to prescribe a rule of future conduct to the citizen, which is the essential element of a law operating on the rights of a citizen; but would be to dictate a judgment for the court not based on the law and the facts in the case, but upon a certain state of opinion as held by the judges of the court, in which a certain result is required to be entered as the judgment of the court. This judgment, it is evident, would be the judgment or the result declared by the legislature, and not by the court. In addition, if the legislature could say an affirmation should be the result of an equal division of the members of the court in opinion, why not with the same propriety say that a minority should govern, or that the then oldest judges agreeing, or the then youngest; or (to reduce it to an absurdity) the three judges who should weigh the most, or any other arbitrary rule that body might choose to adopt? We cannot see where the limit shall be fixed in such a case, except at the discretion of the legislature, if we once admit they can fix any rule at all on this subject. It may as well have been required that the opinion of the Chief Justice should have the right to decide the case, or his opinion should be the basis of the decree, as that a certain decree should be rendered because the court could not agree upon one for itself. This last is certainly the leading feature of the law before us; that is, where the court cannot agree upon an opinion or judgment, one is presented by the legislature arbitrarily, regardless of the merits of the case before the court. This certainly is a usurpation of the judicial function, and far from the true principle of legislative or law-making action. . . . This view brings out clearly the true idea that underlies this enactment; that is, that the judgment required to be rendered is that of the legislature, and not of the court nominally rendering it. We hold, therefore, the act to be void for these reasons. We add, that the law is probably subject to other objections; but we think this suffices to show clearly its unconstitutionality, without need of further discussion.”

#### ENGLAND.

ADJOINING OWNERS. — An extreme application of the rule laid down in *Fletcher v. Rylands* (L. R. 3 H. L. 330) was lately made by the Common Pleas Division in *Humphreys v. Cousins*. The case was peculiar in its facts, which were these: a drain, which began under the house occupied by the defendant, passed out under several other houses, receiving the sewage from them; and then, turning, passed again under the defendant's house; and thence, under the plaintiff's. The drain getting out of order, a quantity of sewage came from it on to the plaintiff's premises, and this action was brought

to recover for the damage occasioned thereby. It appeared that the defendant had no knowledge that the drain passed under his house a second time, and, of course, no knowledge that it was out of repair. The jury found that the damage resulted from a defect or a want of repair of the drain under the defendant's house, but that no negligence was attributable to the defendant in respect of such defect or want of repair. Leave was reserved to enter judgment for the plaintiff for the amount of damages assessed by the jury. In ordering judgment for the plaintiff, the judgment of the court (DENMAN and LINDLEY, JJ.) was delivered by DENMAN, J., who said:—

“The plaintiff and the defendant in this case are tenants and occupiers of adjoining houses; and the plaintiff, upon the facts and findings of the jury, now complains of injuries caused to his premises and stock in trade by water and sewage coming into his cellar from the defendant's premises. The jury have found, in effect, that the injuries complained of are so caused, and have assessed the damages sustained by the plaintiff at £30. The plaintiff has moved for judgment for the amount of the damages so assessed. The facts relied on as a defence to the action are, in substance, as follows. The water and sewage in question came from an old drain, which commenced on the defendant's premises, and received his sewage, ran under and received the sewage of several other houses, turned back through the defendant's premises, ran under the plaintiff's cellar, and then away to a public sewer. This drain was not known to the defendant to turn back and run through his premises under those of the plaintiff, and was not known to be out of repair. It was, however, in fact, out of repair, by reason of age and wear and tear; and its defective state, under the defendant's premises, was the real cause of the mischief. The jury found that the defective state of the drain was not attributable to any negligence of the defendant. Upon these facts, it is to be observed at the outset, that the water and sewage which injured the plaintiff came on to the defendant's land by an artificial drain made for the convenience of the defendant and the other persons whose houses were higher up. We have not, therefore, to deal, as the court had in *Smith v. Kenrick* (7 C. B. 515), with the case of water or other matter coming naturally from or through the defendant's land on to the plaintiff's. Bearing this in mind, it appears to us that it is incumbent on the defendant to show what right he had to allow the filth brought artificially on his land to escape on to the land of the plaintiff. The *prima facie* right of every occupier of a piece of land is to enjoy that land free from all invasion of filth or other matter coming from any artificial structure on land adjoining. He may be bound by prescription or otherwise to receive such matter, but the burden of showing that he is so bound rests on those who seek to impose an easement upon him. Moreover, this right of every occupier of land is an incident of possession, and does not depend on the acts or omissions of other people: it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it. That these are the rights of an occupier of land appears to us to be established by the cases of *Smith v. Kenrick*, 7 C. B. 515; *Baird v. Williamson*, 15 C. B. n. s. 376; *Fletcher v. Rylands*, 3 H. & C. 774; L. Rep. 1 Ex. 265; L. Rep. 3 H. L. 380, and the older authorities there referred to, and the recent decision of *Broder v. Saillard*, L. Rep. 2 Ch. D. 692. In the present case, the plaintiff was bound to receive sewage from the defendant's land through the old drain, but not otherwise: he was not bound to receive it through the surrounding earth or the party-wall, through which, in fact, it came. Further, as the plaintiff was the occupier of a servient tenement, he was clearly not bound to repair the drain or any of the dominant tenements. The plaintiff's rights,

therefore, have been infringed; and the loss he has sustained cannot be said to be *damnum absque injuria*. (See the note to *Ashby v. White*, 1 Sm. L. C. 268, 6th ed.) But the question still remains, has the defendant infringed those rights, and is he the person liable for the infringement? It is said this case is not like *Tenant v. Goldwin*, 1 Salk. 360, or *Fletcher v. Rylands*; because in both of those cases the defendant himself brought on his land that which occasioned the mischief, whereas in this case the defendant received the sewage, and was bound so to do. So far, however, as we can judge, some of the sewage must, in fact, have come from the defendant's own premises in the first instance; but even if this is not to be taken as proved, we are of opinion that, as between the plaintiff and the defendant, it was the defendant's duty to keep the sewage, which he was himself bound to receive, from passing from his own premises to the plaintiff's premises, otherwise than along the old accustomed channel. This duty is incidental to the defendant's possession of land (see *Russell v. Shenton*, 8 Q. B. 449), and is the necessary consequence of the right of the plaintiff. That duty, like its correlative right, is independent of negligence on the part of the defendant, and independent of his knowledge or ignorance of the existence of the drain. The duty of the defendant himself to receive the sewage evidently did not depend on such knowledge; and the fact that he unknowingly receives it affords no justification for allowing it to escape in a manner in which he had no right to let it pass. *Fletcher v. Rylands* is a strong authority to show that this conclusion is correct; for, although in that case the defendant knew of the existence of his reservoir, he did not know that the ground underneath it was in such a state as to render its existence dangerous. It was strenuously but ineffectually urged, that he could not be liable in respect of damage caused by a state of things of which he knew nothing. *Bell v. Twentyman*, 1 Q. B. 766, is a strong authority to the like effect. Indeed, if it be once established that the plaintiff's rights have been infringed by the defendant, and that the plaintiff has been thereby damaged, the fact that the defendant infringed them unknowingly and without negligence cannot avail him as a defence to an action by the plaintiff: see *Lambert v. Bessey*, Sir T. Raym. 421. In short, we think that the true doctrine is contained in the following passage of the judgment of Blackburn, J., in the case of *Hodgkinson v. Ennor*, 4 B. & S. 241: 'I take the law to be as stated in *Tenant v. Goldwin* (2 Ld. Raym. 1089; Salk. 21, 360; 6 Mod. 311; Holt. 500), that you must not injure the property of your neighbor, and, consequently, if filth is created on any man's land, then, in the quaint language of the report in Salk. 361, "he whose dirt it is must keep it that it may not trespass." The case of *Hammond v. Vestry of St. Pancras*, 30 L. T. Rep. n. s. 296; L. Rep. 9 C. P. 316, which was relied upon by the counsel for the defendant, appears to us to have no real bearing upon the present case, inasmuch as the whole argument and decision of that case turned upon the effect of the clauses of a particular act of parliament imposing certain duties upon a public body, and no question arose as to the common-law liability of the occupier of adjoining premises (see the judgment of Brett, J., at p. 322). It was, however, contended that the present case was governed by *Ross v. Fedden*, 26 L. T. Rep. n. s. 966; L. Rep. 7 Q. B. 661: but that was a case in which the plaintiff and the defendant occupied separate stories in the same house; and it was expressly distinguished from a case like the present, which depends simply on those principles of law which regulate the rights and duties of the occupiers of adjacent pieces of land. The case of *Carstairs v. Taylor*, L. Rep. 6 Ex. 217, is also clearly distinguishable on the same ground. The question, whether the defendant was bound, as between himself and the plaintiff, to repair the drain, or so much of it as ran under the defendant's land, was much discussed, but does not really arise; for the plaintiff's cause of action, as originally relied upon, is not that the defendant omitted to repair the drain, but that he omitted to prevent the sewage on his land from coming

on the plaintiff's land otherwise than as the plaintiff was bound to receive it. If the defendant had prevented the sewage from so coming, the plaintiff would have had no cause of action whether the drain was repaired or not. The defendant may perhaps be entitled, as between himself and the owners and occupiers of the other dominant tenements, to call upon them to contribute to the expenses of keeping his and their common drain in repair; and it may be that the plaintiff might have sued all those owners or occupiers, including the defendant, for the damage which he has sustained by reason of such non-repair. But, even if the plaintiff could have sued them all, he was not, in our opinion, bound to do so: he was not bound to rest his case on his ability to establish a duty on them to repair the drain, and a breach of such duty by all who used it. Lastly, it was contended, that, as the defendant was only a tenant and not an owner, he was not responsible; but he was, in point of law, tenant, and as such responsible to the plaintiff (see *Russell v. Shenton*, *ubi sup.*), and he could himself have maintained an action for any invasion of such possession. For these reasons, our judgment is for the plaintiff."

MR. JUSTICE FRY. — The place created by the Supreme Court of Judicature (additional judge) Bill of 1877 has been filled by the appointment of Mr. Edward Fry, Q.C., as the new judge of the Chancery Division. Mr. Fry, who was born in 1827, was educated at University College, London, called to the bar at Lincoln's Inn in 1854, and made Queen's Counsel in 1869.

The new judge is the author of the well-known work on "Specific Performance," and has acted as examiner in Equity in the University of London, and also in behalf of the Educational Council of the Inns of Court. Since the promotion of Sir George Jessel, he seems to have been recognized as the leader of the Equity bar. His appointment appears to have given thorough satisfaction, and to have raised the highest expectations of his success in his new career.

A correspondent of *Mayfair*, writing of the new appointment, says: —

"Mr. Fry is the first Quaker ever called to the judicial bench; and, although I suppose we can hardly expect to see every community represented in a country which, as Voltaire says, has thirty-nine religions and only one sauce, yet we have now had on the bench representatives of all the prominent churches and sects and denominations in the country. The Jews are represented by Sir George Jessel, the Baptists by Justice Lush, the Catholics by Lord O'Hagan, High Church by Lord Coleridge, Low Church by Lord Cairns, Broad Church by Sir Fitzroy Kelly, and the highest form of lay morality (churchwardenship) by Justice Denman. Sir Alexander Cockburn and Baron Bramwell I should not like to classify, except upon the ground laid down by Foote, who, when he was asked what his religion was, replied that it was the religion of all sensible men. "And what," continued the querist, "is the religion of all sensible men?" — "All sensible men keep their religion to themselves."

AMERICAN DECISIONS. — The Lord Chief Justice of England, having received an author's copy of Judge Dillon's work on "Municipal Corporations," has acknowledged the great value of that work, and the respect paid by the English courts to law-books of American origin, and to the decision of American courts, in the following letter: —

"LONDON, Dec. 30, 1876.

"SIR, — I have read your work on Municipal Corporations with very great interest, and admiration of the learning, historical and legal, which it exhibits. It

affords a most valuable exposition of the law of both countries on the important subject of which it treats.

"I pray you to believe that the respect paid by the jurists of the United States to the authorities of this country, in regard to the law which both nations have derived from a common source, is most cordially reciprocated. There is scarcely a discussion of any importance in which American decisions and American authors are not cited, and the judgments and *dicta* of a Marshall or a Story are familiar to us as those of a Mansfield or an Ellenborough. May this ever be so! While, as an Englishman, I desire that a community of origin and a community of interests (when the latter are properly understood) should draw the two nations closer and closer, as a lawyer I could wish that a common jurisprudence should assist to cement the bonds of international amity.

"We have had recently in our Court of Criminal Appeal a very interesting discussion on a great question of international law, in the case of the '*Franconia*.' I take the liberty of sending you herewith a copy of my judgment in the case. The review of the authorities (many of them American) may give it an interest in your eyes.

"With the assurance of my great and sincere respect, I remain your most obedient servant,

"HON. JOHN F. DILLON, &c."

"COCKBURN.

This letter, which was first published in the *Central Law Journal*, has attracted much attention in England, and has been the subject of considerable comment on the part of contemporary legal journals. The *Irish Law Times* thus speaks of it:—

"It strongly fortifies the opinion we have before now expressed as to the practical value and weight of the judgments pronounced by the American tribunals. But it is not merely as authorities that they are utilized in England; for there, according to *The Solicitor's Journal*, they are also extensively used 'as a quarry from which counsel hew out arguments, the origin of which they do not always acknowledge. If a careful investigation were made,' adds our contemporary, 'of the admirable arguments which appear in the various law reports on certain branches of law, we have a strong suspicion that a transatlantic parentage would be found for many of them.' It were to be wished that the American adjudications were more generally known in this country; and it is one of the advantages presented by this journal that it records and brings under notice many of the more important of those decisions. Dr. Von Harrasowsky, indeed, has recently published a learned work, at Berlin, supporting the theory that the whole civilized world ought to have one system of law, just as there ought some day to be one language which educated persons of all nations shall agree to use. But, though that consummation is likely to be rather remote, we should, at all events, cordially indorse the sentiment expressed by Sir Alexander Cockburn: '*As a lawyer, I could wish that a common jurisprudence should assist to cement the bonds of international amity.*'"

THE TRUE PRINCIPLES OF JUDICIAL DECISION. — The movement in favor of reform in the law seems clearly not to have spent its force; and, if we are to adopt the views of Mr. T. W. Smith, Q.C., Judge of the Hereford County Court, appears altogether to have fallen short of the end which it is desirable should be attained. In *Barrett v. Lane*, a question arose whether the requirements of a certain statute had been complied with; and the judge

was clear that they had. Mr. Gwillim, for the defendant, was equally clear that they had not, and asked leave to appeal. The learned judge, however, declined to grant leave, and called attention to the condition of things in the higher courts, that the decisions of the High Court of Justice were week by week overruled by the decisions of the Court of Appeal, and these in turn were upset by the House of Lords. In "this disgraceful state of things," his Honor felt that he was not bound, nor indeed justified, in permitting a defeated party to subject his adversary to such vicissitudes of fortune. Warming with his subject, the learned judge read a draft of "an act for giving greater effect to the true principles of judicial decision," prefacing his reading with an expression of the hope that his words might be made as public as possible by the reporters present. He said : —

"Equally eminent judges have been and are governed by different systems or theories of judicial decision, leading to opposite results : the one mainly proceeding on technical refinements ; the other, on principles of natural justice, common sense, and public policy ; the one deciding on general rules or principles, the other looking to the exceptive circumstances of each case, as much as to general rules or principles. The adoption of the former system by some judges has led to endless uncertainty, frequent litigation, both original and appellate, incalculable expense and vexation, and the grossest injustice and contravention of public policy ; and it has been the prolific source of a mass of refined trash and learned rubbish, which strains the brains, occupies the public time, and exhausts the bodily and mental powers of the judges, to no purpose but to defeat moral right and sound expediency. To remedy this truly disgraceful and mischievous state of things, what is needed is an enactment to this effect : 'Subject to any plain enactment or plain agreement to the contrary, and subject to the established rules of law, where an exception to such rules is not called for by the circumstances, all cases in litigation, other than cases of construction, shall, in the discretion and to the best of the judgment of the judge or judges deciding the same, be decided, so far as may be, according to justice, moral right, and public policy ; and all cases of doubtful construction shall, in the discretion and to the best of the judgment of the judge or judges deciding such last-mentioned cases, be decided according to the presumable intention of the parties or testators. But the operation of this enactment shall be subject to any previous decisions of the superior courts, clearly and absolutely governing the cases in litigation, in the opinion of the judge or judges deciding such cases.'"

It would be interesting to know whether the learned judge's new scheme is sufficiently comprehensive to enable him to deal with cases like that which lately came before the Clerkenwell Police Court. A man came before Mr. Barstow for advice as to dealing with his wife, saying that she continually annoyed him by "provoking the devil" in him. Mr. Barstow said he could render no assistance. The applicant then said, that if it continued he feared "the devil would tempt him to do some unlawful act." Mr. Barstow was still clearer that he could be of no help, as he "had no *jurisdiction*."





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